Commission to Review Massachusetts Anti-Takeover Laws

Interim Report

Co-chaired by:

Joseph D. Alviani
Secretary of Economic Affairs
Commonwealth of Massachusetts

Paul J. Eustace
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Michael S. Dukakis
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Volume 1

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INTERIM REPORT

OF THE

COMMISSION TO REVIEW MASSACHUSETTS ANTI-TAKEOVER LAWS

November 1988

Joseph D. Alviani, Co-chairman
Secretary of Economic Affairs

Paul J. Eustace, Co-chairman
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COMMISSION TO REVIEW MASSACHUSETTS ANTI-TAKEOVER LAWS

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I. EXECUTIVE SUMMARY

A. Introduction

The competitiveness and growth of the American economy, and the well-being of our citizens, depend on long-term investments in physical plant, research and development and continuous worker training and retraining. While takeovers are not a new phenomenon, their significance in shaping corporate strategic planning and the operation of financial markets has substantially increased over the past two decades. Now even the largest American firms consider themselves vulnerable to takeover attempts. Takeovers can be important mechanisms for transferring corporate control, thus ensuring management accountability or they can be extremely efficient mechanisms for short-term financial speculation. In either case, successful takeovers and takeover attempts are often followed by major organizational changes for the target company, resulting in shifts in management, layoffs and reduced investments in areas critical to long-term competitiveness. The prospect of such changes, combined with perceived abuses on Wall Street and the high level of debt incurred in both takeovers and takeover defenses, have created an environment that encourages states to regulate takeover activity to protect not only shareholder and management investments, but also the investments of labor and the public sector in long-term economic growth.

B. Conclusions

The Commission met thirteen times over the course of nine months to hear presentations and testimony from the labor, business, banking, and investment communities, lawyers, economists, other academicians and takeover practitioners concerning the appropriate state role in the regulation of takeovers and takeover-related activities. (Volume II) In its subsequent meetings to evaluate the various options for state and federal action, the Commission relied on the following fundamental findings:

> If Congress were to develop a comprehensive and timely response which effectively balances takeovers' social and economic costs with their potential benefits, action at the federal level with full pre-emption of state regulatory authority in this area would be preferable. Absent a comprehensive federal response, however, the states must retain their traditional authority to regulate corporate activities to protect local economic interests. In this capacity, they can also serve as valuable laboratories to test alternative regulatory approaches.
>
> A comprehensive federal response is not likely in the near future. Therefore, state action is warranted to protect the economic well-being of the Commonwealth and its citizens. In so doing, careful consideration must be given to the

overall effect of different approaches on business climate and competitiveness so that we ensure sustained job creation and economic growth.

Massachusetts should not, even if it could, seek to prevent all takeovers since they are an important component of the ongoing process of creating and sustaining a dynamic and competitive economy.

Takeovers and takeover-related activities raise a broad variety of concerns which fall into three basic categories: a) short-term social and economic disruptions to employees, communities, consumers, suppliers and creditors; b) deterrents to long-term investment in research and development, product, market and human resource development, and, plant and equipment which raise serious concerns over the long-term social and economic impacts of this activity on the economy; and c) pressures to adopt short-term corporate strategies generated from increased levels of corporate debt resulting from debt-financed takeovers and takeover defenses.

Takeovers undertaken exclusively for short-term, financial profits raise all the above concerns with little evidence that long-term takeover-related productivity gains outweigh the social and economic costs to the target corporation, its shareholders and its stakeholders.

"Speculative" transactions constitute abuses of the takeover mechanism and, therefore, to the extent they can be distinguished from "productive" takeovers, should be discouraged in order to protect the economic well-being of the citizens of the Commonwealth by promoting the long-term interests of corporations doing business in Massachusetts and the interests of their shareholders and stakeholders.

Takeover-related dislocations/disruptions, whether following "productive" takeovers which enhance productivity and economic performance or "speculative" takeovers which may do neither, represent a subset of the dislocations/disruptions experienced by corporations, their shareholders and their stakeholders in a competitive and dynamic economy. Therefore, policies to facilitate/expedite stakeholder transition are essential components of a comprehensive response to takeover-related activities. To be equitable, such responses should not differentiate between acquirors and incumbent management unless unique takeover-related circumstances require such a distinction in treatment.

The Massachusetts Control Share Acquisition Act (M.G.L. c. 110D & 110E) has, consistent with the Legislature's intent, been valuable in providing target directors and shareholders with the time needed to evaluate unsolicited offers and respond effectively. However, the Act does not adequately

address a number of the more coercive and abusive aspects of "speculative" takeovers - those which are most closely linked to stakeholder dislocation/disruption.

M.G.L. c. 110E may represent an unconstitutional burden on interstate commerce. More important, it may serve almost exclusively as a tool for litigation raising the costs and uncertainties associated with takeovers. Even if held constitutional, Chapter 110E may be of little value given the Securities and Exchange Commission's new rule on "Shareholder Disenfranchisement", Rule 19c-4.

With these fundamental assumptions in mind, the Commission proceeded to develop recommendations which balance the long-term economic needs of the Commonwealth and its citizens with the immediate interests and needs of corporations and their stakeholders and shareholders in response to the serious and complex issues raised by takeovers and takeover-related activities.

C. Recommendations

In developing its recommendations, the Commission carefully evaluated the competing interests of the labor, business, banking and investment communities in the context of rapidly changing legal, economic and financial environments. Its recommendations fall into three main categories: 1) deterring "financial" takeovers whose social and economic costs outweigh their potential long-term benefits to shareholders, other corporate stakeholders and the economy; 2) regulating individual takeover transactions to limit potential abuses and excesses; and 3) responding to the disruptive effects and consequences to stakeholders inherent in takeovers. Each recommendation, addresses specific concerns raised by the various interests represented on the Commission and can be evaluated in this context. It is the Commission's belief that the following set of recommendations serves the interests of each of these groups and in the process promotes the Commonwealth's long-term economic well-being.

The Commission makes the following recommendations:

File legislation for a business combination law to supplement our current control share acquisition laws (M.G.L. c. 110D & 110E) to deter two-step mergers and under-financed or over-leveraged takeovers which often prevent a segment of shareholders from realizing the full value of their investment and which are most likely to lead to the sale of target assets and, therefore, in the dislocation of employees, communities and other stakeholders.

Support efforts to amend the National Labor Relations Act to require assumption of collective bargaining contracts following transfers of control and pending action at the federal level

adopt state legislation similar to that enacted in Delaware to require assumption of collective bargaining agreements that cover workers employed in Massachusetts.

Establish one or more mechanisms to charge back to employers the costs to the state of worker dislocations, including takeover-related dislocations of stakeholders, such as Re-employment Assistance Benefits, extended health care coverage, job counseling, referral, placement and training services as well as support services such as child care and transportation.

Support legislation filed by the Administration and the Senate and House Chairs of the Joint Committee on Commerce and Labor without amendment to clarify the fiduciary duties of corporate directors permitting them to consider the interests of stakeholders and the local and state economies in determining what is in the best interests of the corporation and its shareholders.

Amend M.G.L. c. 110C §3 to replace the transaction prohibition recently voided by the federal courts with monetary and/or criminal penalties and to limit its application to domestic corporations.

Support legislation currently before the Massachusetts House of Representatives to make certain technical amendments to the Massachusetts Control Share Acquisition Act, M.G.L. c. 110D & E.

Monitor court decisions and the federal regulatory environment to determine effectiveness of M.G.L. c. 110E.

Affirm the state's role in takeover regulation to ensure that it retains its traditional authority to protect the welfare of citizens and local economic interests.

Support continued efforts by Congress to develop a comprehensive and effective response to the issues raised by takeovers and related activities, particularly tender offer reform.

Increase Securities and Exchange Commission (SEC) enforcement of current insider trading laws.

Support the states' efforts to enact legislation to obtain access to Hart-Scott-Rodino premerger filings. Support amending the Clayton Act to lengthen time periods for federal review of mergers and takeovers and urge Congress to examine whether the Department of Justice Merger Guidelines give undue weight to potential efficiencies in otherwise anticompetitive mergers.

The Commission considered in depth several proposals which are not among its recommendations in this Interim Report. In some cases, due to the complexity of their policy and legal implications, the Commission members were unable to reach a clear consensus and have made a commitment to continue consideration of these proposals for the

Final Report. These items are discussed in greater detail in Section X below. In other cases, after careful consideration the Commission specifically rejected certain proposals or components of proposals as inconsistent with the general conclusions they had reached about the effect of takeovers and the appropriate role of the state in their regulation. All proposals considered by the Commission are included among the Working Papers in Volume II of this report.

D. Agenda for Subsequent Action

The Commission was unable to complete deliberation on a number of the important issues and proposals placed before it within the timeframe required for issuing this Interim Report. It has, therefore, committed itself to continue the process of evaluating several specific proposals and to analyze several issues which the Commission felt were essential to a comprehensive state response to the effects of takeovers and related activities on the labor, business, banking and investment communities and the Commonwealth's economic well-being. Where appropriate, the Commission intends to make concrete recommendations concerning these issues/proposals in its final report.

The following issues/proposals were placed on the Commission agenda for the Final Report:

Proposal to require as a matter of equity some form of severance benefits for all employees where takeover-related compensation plans have been adopted to protect certain members of management.

Proposal to amend M.G.L. c. 110D & 110E to extend its coverage to include certain regulated industries such as banks, insurance companies and public utilities.

Explore options for encouraging firms to adopt corporate strategies and governance procedures designed to stimulate long-term investments in product, process, market and human resource development, employee participation, profit-sharing, performance-based compensation, expanded participation of outside directors and/or employee representatives on boards and of other modifications assumed to lead to more effective and efficient management, increased productivity and a decreased probability that a firm would ever become a target.

Develop specific positions on pending federal proposals for tender offer reform.

Develop specific positions on pending amendments to federal insider trading requirements.

Examine the issues raised by the use of monies available to institutional investors, particularly pension funds, for takeovers and leveraged buyouts such as the quality of the debt purchased, the long-term security of these monies and of the individuals on whose behalf they are invested.

Further development and analysis of Massachusetts takeover trend data over an expanded timeframe.

II. INTRODUCTION

A. Commission establishment and authority

The Commission to Review Massachusetts Anti-Takeover Laws was established pursuant to Section 3 of Chapter 272 of the Acts of 1987 which provides:

> Two years following the effective date of this act the governor, upon the advice of the secretaries of economic affairs and labor, shall submit to the general court a report evaluating the effect of chapters one hundred and ten D and one hundred and ten E of the General Laws on the commonwealth's well-being. Said report shall include, but not be limited to, the effect of said chapters on patterns and trends in mergers and acquisitions, jobs saved or retained, long-term investments in capital equipment and research and development, managerial accountability and shareholder voting rights. Said report shall also include recommendations for legislative action to address any problems or opportunities referred to in said report. St.1987, c. 272, § 3.

Co-chaired by Joseph D. Alviani, Secretary of Economic Affairs and Paul J. Eustace, Secretary of Labor, the Commission was activated in February 1988 with members representing the labor, business, investment banking, institutional investment, legal and academic communities as well as the public sector. It was specifically charged with determining the effectiveness and appropriateness of existing Massachusetts takeover laws in light of federal court decisions vacating a portion of Massachusetts Takeover Regulation Act, M.G.L. c. 110C; sufficient experience with the Massachusetts Control Share Acquisition Act (M.G.L. c. 110D & 110E) to begin evaluating its impact; and a variety of bills pending before the Joint Committee on Commerce and Labor of the General Court designed to increase the effectiveness of existing anti-takeover laws through direct amendment or through amendments to related business regulation or incorporation laws.

B. Commission purpose and objectives

The Commission has interpreted its mandate broadly to include not only an evaluation of the direct impacts of Chapter 272 on the Commonwealth's economic well-being but to include an examination of what policy components are required to address the complex issues raised by takeovers and takeover-related activities in a dynamic and competitive economy. This interim report reflects the Commission's careful and detailed deliberations on the role of takeovers in a dynamic economy; their short- and long-term effects on corporations, their shareholders and corporate stakeholders, including employees, communities, suppliers, creditors, consumers and the state; and the appropriate roles of state and federal governments in the regulation of takeovers and takeover-related activities. It is designed to

assist the Governor and the General Court in dealing with these extremely complex issues.

C. Relation of interim and final reports

The Commission is producing this interim report to allow timely action on bills filed for the 1988 legislative year as well as to expedite action on those recommendations adopted by the Administration and/or Legislature. The Commission will issue a final report on or about June 1989 pursuant to Section 3, Chapter 272 which will address the outstanding issues identified in Section 10 of this report.

III. OVERVIEW

A. What are takeovers - what role do they play in our economy

The connotation of the word takeover is, at best, controversial. Almost by definition, takeovers are disruptive. Management teams may be replaced, employees reassigned or laid off, facilities closed, suppliers changed and investment programs cut back or re-directed. Such changes have an immediate, and sometimes devastating, impact on employees, local businesses and communities that depend on a corporation for income, leadership and charitable contributions. At the same time, takeovers are effective tools for restructuring required to respond to fundamental market changes caused by de-regulation, technological change, increased foreign competition or the inevitable maturing of product lines and industries. Hostile takeovers may be the only effective way to remove inefficient management. This suggests that while takeovers may constitute short-term traumas, they may also be an essential part of the long-term process of "creative-destruction" that frees up economic resources, making future job creation and economic growth possible by moving labor and capital from less to more efficient uses. However, takeover abuses and excesses may undermine the positive role they can play in a dynamic economy and contribute to an uncertain environment that diverts corporate resources from the long-term investments essential to productivity and competitiveness to short-term strategies designed to protect the corporation from attack.

One of the most difficult aspects of grappling with the issues raised by takeovers appears to be defining the term itself. For as long as there have been corporations, there have been takeovers. They have always been controversial. However, at any particular point in time, the substance of the controversy, and, the popular definition of the term "takeover" are shaped by the issues of public concern. In the 1890's the controversies surrounding takeovers related to the formation of tremendous "trusts" created to control separate corporations under common ownership. In a period where national capital markets as we know them now did not exist, these legal devices were essential to amass the private capital required to build the national rail, utilities, steel and oil industries. However, the "trusts" also proved to be effective devices for exerting monopoly power over consumers. Therefore, during this period, takeovers were defined in terms of horizontal mergers of companies producing the same or similar goods or services and the primary concern was their anti-competitive effect on markets and consumer prices. The policy response led to the enactment of state and federal antitrust laws and comprehensive regulation of specific industries that were natural monopolies.

In the 1980's the controversies surrounding takeovers and, therefore, the popular definition of the term differ dramatically. The evolution of highly sophisticated national and international capital markets with millions of individual and institutional investors as, perhaps, the central component of our economic infrastructure, has been accompanied by a growing awareness of

takeovers as financial transactions with corporations buying and selling each other as they once traded shares of stock. Given the size and diversity of our national economy as well as the increasing interdependence of the world economy, the anti-competitive impacts of mergers no longer appear to be the central concern. De-regulation of the financial industry increased competition among financial intermediaries, particularly in the mergers and acquisitions area, stimulating the development of innovative financial instruments, including "junk" bonds, which made it possible for entities with virtually no assets or management experience to purchase control of a corporation by purchasing its stock on the stock exchanges. Therefore, during the 1980's, takeovers have been defined in terms of hostile tender offers and the primary concerns relate to the effects sudden and/or frequent transfers of corporate control (and the means used to effect such transfers) have on corporations, their shareholders and stakeholders, on capital markets, and on long-term job creation and competitiveness.

Viewed as the transfer of control of one corporation to another business entity, takeovers can occur through any of a variety of legal mechanisms including merger, divestiture, acquisition of assets, tender offer for a controlling interest of shares, leveraged buyout or a proxy contest to gain control over the board of directors, to name a few. The nature of these transactions vary, as do their implications for different corporate constituencies and the relevance of different regulatory frameworks. However, each transaction shares one common factor: each has a direct effect on the decision-making structure of the corporations involved. Corporations, in the most limited sense, are legal devices for amassing capital from private investors for productive efforts. However, the utility of the corporate entity in this limited sense depends on its ability, through management, to plan, to allocate capital strategically, to hire and keep a productive workforce, to efficiently produce and market goods and services, to contract with suppliers and distributors, to adapt to change and many other things. In other words, the essence of the corporation is the control needed to focus and organize diverse resources for productive purposes. Takeovers, thus, go to the core of corporate existence, control.

Much research has been done to answer the question: Why do takeovers occur? There is little consensus. On a transaction basis the motives probably vary as much as the personalities of the individuals doing the deals. In determining the appropriate state role in responding to takeovers and takeover-related activities, the more relevant question may be which motivations predominate in the current takeover wave and what are the implications for corporations, their shareholders and stakeholders and the economic well-being of the Commonwealth and the nation. The motivations generally discussed appear to fall into three broad categories reflecting the priority given to different business considerations: 1) operational efficiency/productivity; 2) financial considerations; and 3) personal considerations. Most takeovers are driven by several of the motivations listed below.

Efficiency/productivity

- replacement of inefficient management
- creation of synergies
- sharing of complementary resources
- capturing opportunities created by divergent expectations caused by market restructuring and economic transition (e.g. de-regulation, foreign competition, technological change, maturing products and industries)
- retirement of senior management (e.g. CEO of family-owned firm)

Financial

- undervaluation of corporation by capital markets or the corpor ation
- gains made by breaking "implicit" long-term contracts with labor, suppliers, transferring wealth from bondholders
- acquisition of a source of free cash flow
- capturing tax savings currently enjoyed by the target or from the debt financing of the takeover itself
- diversification to avoid risk, smooth earnings or achieve other objectives of portfolio management
- acquisition of monopoly power
- speculative motives such as asset plays, arbitrage, greenmail

Personal

- entrepreneurship
- empire-building/hubris

In several respects these categories are difficult to separate and may be somewhat misleading. If one looks at takeovers as business transactions, it is immediately clear that they would not occur unless the "buyer" thought or could be convinced that there were potential profits or hidden values to be captured through a merger. In this sense, all takeovers are driven by financial motivations. The real questions raised by the motivation issue are: 1) Why has this particular target been selected? and 2) Where are the potential profits or hidden values? A takeover which enhances efficiency and productivity will have positive financial effects by generating cost-savings in the production/marketing of existing goods and services or in the development of new goods and services. Such transactions create new value, producing profits for both the buyer and the seller, their shareholders and stakeholders. At the other extreme, pure speculative motives, such as asset plays (where the "buyer" purchases stock to make a profit on the market rumors or through greenmail), create no new value in the form of new goods and services or efficiency gains. They are, essentially, zero-sum games. Whatever "paper" profits the speculator makes must reflect: 1) an undervaluation of corporate assets by the stock market which is corrected after the stock is put into play; 2) a transfer of wealth to the speculator from the corporation, its shareholders and/or its stakeholders; or 3) some combination of the above. Such transfers can be made through layoffs, wage cuts, corporate assets sales and shifts

from corporate strategies requiring long-term investments to "cash-cow" strategies focused on short-term profit-making as well as other means.

The current takeover wave, often perceived in terms of the hostile takeover, raises a broad variety of concerns, the most important of which include: 1) disruptions and dislocations of employees, communities, suppliers, consumers and other stakeholders in companies affected by takeovers; 2) pressures placed on corporations to focus on short-term profits and earnings at the expense of the long-term investments and expenditures essential to job creation and growth; 3) increases in corporate debt and debt-to-equity ratios that could contribute to economic instability in the event of recession; and 4) the pervasive effect of takeovers on the strategic planning of all corporations regardless of size, industrial sector and the likelihood that a particular firm will become the target of a hostile takeover. Other frequently raised concerns include: 1) the diversion of capital from the building of new plant and facilities to the acquisition of old ones and the continued aging of our industrial infrastructure; 2) the development of new financial instruments to facilitate takeovers such as "junk bonds" and "bridge loans" which may have adverse effects on the functioning of U.S. capital markets; 3) the losses suffered by some stock and bond holders, particularly in contrast to the gains of takeover specialists; 4) the high transaction costs of takeovers which go to lawyers, bankers and other takeover practitioners; and 5) the much older but ongoing concern that takeovers lessen competition and harm consumers.

The vast majority of takeovers (over 95%) begin and end as "friendly" transactions, undertaken voluntarily by both parties to increase their productivity and efficiency. A firm may be seeking new productive capacity, new product lines, specific services or expertise to complement existing capacity or capital. Takeovers of this type create efficiency producing "synergies" beneficial to both firms and, therefore, to the economy as a whole. For example, a small firm may develop a product with international market potential but lack the marketing expertise and personnel to profit from its development. By approaching a larger firm with marketing expertise and international distribution networks, the small firm may realize these profits and the larger firm's marketing efforts may become more profitable through more intensive use of under-utilized resources. In this way both firms benefit as do their shareholders and other stakeholders and the economy as a whole. Another efficiency producing benefit which may result from takeovers relates to economies of scale. Many corporate activities such as research and development must be undertaken on a certain scale to be profitable. Therefore, the merger of two firms with marginally profitable but compatible R & D operations might realize significant cost-savings if they combine operations at a scale which would benefit both firms. The interaction of the two R&D teams might also generate synergies leading to new product developments unforeseen by either firm independently. Another efficiency producing aspect of takeovers relates to their role in meeting the needs of small growth firms. While providing the greatest potential for job creation, these firms are often starving for

"patient" capital (10 years before repayment required) and for the management expertise to operate them once they get beyond the start-up/venture capital stage. Limited amounts of "mezzanine" financing, in the form of long-term loans or more often loan guarantees, are available from the private and public sector. However, larger firms seeking to replace declining product lines or to diversify into related product areas provide a critical source of capital for these firms and serve as valuable resources for management expertise.

Obtaining efficiency-producing synergies, economies of scale or capital and/or management expertise does not per se require a takeover. However, there are many circumstances when taking control of a firm with the necessary characteristics may be the most efficient as well as the most effective means. Where attaining the desired efficiencies requires a stable, long-term relationship both firms may seek a transfer in control to secure access to the strengths of the other that produce the efficiencies. In the marketing example above, the small firm might wish only to license its product to the larger firm in return for its marketing expertise. However, if the small firm thought there was potential for more products which would require international marketing or the larger firm might not actively market the product there might be greater security through a takeover. The attractiveness of a takeover in the economies of scale example may be more apparent. If neither firm can do better than break even alone, it is in both their interests to lock up each others capacity to ensure future profitability. Similarly, in the case of the small firm needing capital and management expertise, the larger firm may not want to assume the risk of providing capital to a firm without securing sufficient management control to guarantee an adequate return. Or, conversely, the smaller firm may place a premium on the management skills of the larger firm which it can access only by becoming a part of that corporate entity.

Despite the numerical predominance of friendly takeovers, the current interest in mergers has focused primarily on the hostile takeovers of very large, often multi-billion-dollar, corporations by entities with limited assets but access to financing. Such "raiders" accumulate tremendous levels of debt using the target corporation's assets as "collateral" to finance the transaction and then sell off target assets to pay down the debt often closing plants and laying off large portions of the workforce in the process. Often referred to as "junk-bond, bust-up" takeovers, this type of transaction, while statistically rare, is increasingly perceived as the norm. As a result, despite the substantial role takeovers play in the process of economic evolution by facilitating industrial restructuring and the reallocation of scarce resources to more efficient uses, the general perception of takeovers is very negative. Perhaps more important, the perceived potential for becoming the target of a hostile "raid" is driving many corporations to adopt short-term strategies to ensure their continued independence, diverting resources from the long-term investment essential to growth and job creation.

B. Why are we concerned about takeovers?

Takeovers raise a broad variety of concerns. The most immediate of these are the potential social and economic costs which may result from plant closings and layoffs caused by takeovers and subsequent restructurings or restructurings undertaken as a takeover defense or after a successful takeover defense. Little data is available to conclusively demonstrate that on average takeovers or takeover-related restructurings cause greater dislocations than would have otherwise occurred as a function of changing technologies, increasing competition and market structure. There is evidence to suggest that a distinction can be made between "financial" takeovers done exclusively to capture short-term profits and "industrial" takeovers done as part of a business building strategy. "Financial" takeovers are often highly leveraged requiring the sales of target assets to pay down the debt incurred to finance the transaction. Such "bust-up" takeovers often result in plant closings and layoffs with little indication that new efficiencies or productive capacity is created. The result is not limited to the immediate job loss of effected employees. The lost purchasing power of a corporation and of its workers following a plant closing can have a serious impact on suppliers of goods and services to workers and the corporation itself which ripples through the community and in some instances throughout a regional economy. There may be special public concern in the takeover context for communities or regions that are highly dependent on one company or on an industry. However, in each of these instances it is far from clear whether the appropriate response is that of preventing takeovers to avoid the associated dislocations or to provide assistance to effected individuals and communities to facilitate transition.

The second major issue raised by takeovers relates to their long-term effect on economic competitiveness. Long-term competitiveness requires sustained investment in research and development, product and process development, market and human resource development and in physical plant and equipment. It also requires the availability of "patient" capital that need not be repaid for 5 - 10 years to make these investments. Maintaining a competitive edge also requires the kinds of resource reallocation from unproductive to more productive uses which drives structural economic change. Inherent in this process of "creative destruction" is the idea of temporary dislocation. Finally, competitiveness requires aggressive, entrepreneurial management willing and able to assume reasonable risks and a highly skilled, adaptable and motivated workforce.

One of the key concerns raised by takeovers and the threat of takeovers is that they may create disincentives to making the long-term investments essential to enhanced productivity and competitiveness because those long-term investments can, in the short-term, lower stock prices making a firm a more attractive target. There is a further concern that in highly-leveraged transactions, new management may have no choice but to focus on short-term, profit maximizing strategies to meet interest payments on the debt accrued to finance the transaction. The strongest argument to support takeovers is that they are in many cases the only effective mechanism for

removing "inefficient" management that has not adapted to changes in the marketplace. However, to the extent that takeovers and the threat of takeovers create an environment that changes management behavior to respond to forces that appear to require adoption of short-term strategies to keep stock prices high and keep "raiders" away, any efficiency producing effects takeovers may have could easily be outweighed by the disincentives they create for long-term investment.

Takeovers and takeover-related activities also raise concerns about their effect on capital markets and the availability and mobility of capital for developing new productive capacity. Capital availability and mobility depend on two major factors: 1) investor confidence in the integrity of capital markets and the economy; and 2) the extent to which investors consistently get a return on their investment. Takeovers provide shareholders with clear short-term benefits in the form of 30-50% takeover premiums on their shares which should encourage speculative investing. However, unless takeovers crate new wealth by increasing productivity or reallocating capital to more productive uses, the long-term benefits to shareholders are unclear. This is particularly troubling for institutional investors whose primary purpose is to invest their own assets or those held in trust for others in capital markets. As institutional investors control a growing share of available capital, the long-term effects of takeovers on the quality of their investments and the general operation of capital markets becomes of greater concern. Takeover abuses and excesses such as two-tiered tender offers, street sweeps, self-tender offers and greenmail raise concerns not only about equal treatment of shareholders but about management self-dealing that may undermine shareholder confidence in capital markets.

Another concern raised by takeovers and related activities relates to the effect increasing levels of corporate debt (leverage) has on the stability of American corporations and institutional investors in the downturn of the next business cycle. The use of below investment grade ("junk") bonds to finance takeovers, leveraged buyouts and defensive restructurings has substantially increased the overall level of corporate debt over the past decade with a compensatory decrease in the amount of equity outstanding. While many foreign corporations have higher debt to equity ratios, there is a growing sense that American corporations may be over-leveraged, raising concerns that these firms may have difficulty getting access to foreign capital in the future. As the debt to equity ratio increases, the need to service debt and pay down principal creates additional pressures to adopt conservative, short-term business strategies to ensure sufficient liquidity.

C. What do we know?

1. Introduction

No definitive conclusion on the effect of takeovers on the economy has yet been reached. There are two divergent schools of thought and this difference in opinions is well illustrated by the following viewpoints on mergers.

The 1985 Economic Report of the President contains this strong defense of mergers:

> The available evidence...is that mergers and acquisitions increase national wealth. The improve efficiency, transfer scarce resources to higher valued uses, and stimulate effective corporate management. The also help recapitalize firms so that their financial structures are more in line with prevailing market conditions. In addition, there is no evidence that mergers and acquisitions have, on any systematic basis, caused anticompetitive price increases.
>
> These findings are consistent with the possibility that some individual transactions turn out to be misguided and generate losses for the economy at large. Public policy should not, however, be based on the outcomes of individual transactions, because it is impossible to predict in advance which transactions will succeed and which will fail. Public policy therefore must be based on aggregate trends describing the consequences of takeovers as a whole. On this criterion, there is no economic basis for regulations that would further restrict the merger and acquisition process. Indeed, the economic evidence suggests that existing regulations impose restraints that may deter potentially beneficial transactions. [1985 Economic Report of the President, Washington, U.S. Govt. Print. Off., 1985, p.196]

Peter Drucker, the well known economic and management consultant, presents a quite different view.

> The wave of hostile takeovers...is in itself a serious disorder. There is a great deal of discussion about whether hostile takeovers are good or bad for shareholders. There can be absolutely no doubt, however, that they are exceedingly bad for the economy. They force management into operating short=term. More and more of our businesses, large, medium-sized, and small, are not being run for business results but for protection against the hostile takeover....
>
> But worse still, companies are being forced to do stupid things to prevent themselves from being raided. It is, for instance, becoming dangerous for any company to be liquid. Liquidity can only attract the raider who can expect to

repay himself, and the debt he incurs in bidding for the company, out of the companies own cash. And thus companies who find themselves in a liquid position, no matter how much cash they may need only a few months further on, hasten to squander the cash -- for instance in buying up something that is totally alien to their own business that has only one advantage: It absorbs a lot of money. Even worse, companies increasingly cut back on expenses for the future, such as research and development....

The fear of the raider is undoubtedly the largest single cause for the increasing tendency of American companies to manage for the short term and let the future go hang. The fear of the raider demoralizes and paralyzes. The impact on the morale of management people and of professional people can hardly be overestimated. And worse still, after the successful takeover, the morale in a company is destroyed, often forever. The who can leave, do. The others do their minimum. [Drucker, Peter F. The Problem of Corporate Takeovers - What Is To Be Done? The Public Interest, no. 82, Winter 1986. p. 12-13.]

Both positions cannot be right.

The differences in opinion in the academic research in this area are closely related to strong disagreements over the proper methodologies for measuring the effects of takeovers on individual firms and the economy as a whole. For the most part, the studies which tend to find that takeovers have a positive effect are "event studies" based on measures of stock price changes over relatively short periods of time. Based on an assumption that the stock market is the most efficient measure of a corporation's value, these studies compare a corporation's stock prices before the announcement of a tender offer and after and sometimes at subsequent time intervals. If stock prices rise this is assumed to reflect "hidden" value in the corporation that new, more efficient management will be able to realize on behalf of shareholders. There is, therefore, an assumption that all stock price increases reflect efficiency-producing changes that will contribute to the better functioning of the corporation and the economy as a whole. By contrast, most of the less optimistic studies are based on "accounting studies" which examine the long-term performance of corporations involved in takeovers. What follows is a very brief summary of the emerging consensus based on these studies.

Target shareholders earn substantial market premiums from the announcement of takeovers.

For tender offers in the 1970s, target shareholders received premiums of between 16 and 30 percent around the time of the tender offer announcement. For tender offers in the 1980s, takeover premia had substantially increased to an average of about 53 percent. These target shareholder premiums have often been used to support theories that takeovers replace inefficient management or create new value

through the development of synergies or economies. It is at least as plausible that such premiums simply reflect the speculative aspect of takeovers as financial transactions.

The effect of a takeover announcement on bidder shareholders is far less predictable.

Earlier studies examining takeovers in the 1960s indicated that bidder shareholders received small but significant premiums, about 5%, following announcement of a tender offer. However, studies of takeovers in the 1980s suggest bidder shareholders receive no short-term gain and may in fact show a small loss.

Target companies were "undervalued" by the stock market.

Studies indicate that the ratio of the market cost to the replacement cost (Tobins q) of target companies is low, suggesting that target shares are selling at a price below their replacement cost. Other studies have found that many targets are firms with below-normal stock price performance before the offer is made. The critical issue is to determine why the target stock prices are depressed, whether this represents a misvaluation by the market and if not whether new management could do anything to improve the situation. A more recent study suggests that the "undervalued" asset theory may only apply to the targets of hostile takeovers.

Targets are not on average "poor-performers" in terms of their profitability.

This would tend to undermine the "poor" management hypothesis frequently offered as a rationale for takeovers, particularly hostile takeovers.

Historically, target companies have been in industries experiencing relatively high rates of growth compared to the economy-wide average.

Studies indicate that bidders seek firms growing faster than the industry average, particularly in industries growing faster than the economy as a whole. This would suggest that targets are efficiently managed with substantial long-term profit potential.

Targets tend to have relatively conservative financing structures.

Studies have consistently shown that targets have lower than average levels of debt, are "cash-rich" or have greater cash flow than non-targets or bidders. Particularly as takeovers are increasingly financed with debt, the attractiveness of a "cash-rich" target which can pay down debt incurred to finance the transaction would be considerable.

Tax savings are not a primary motivation in most takeovers.

As a general matter, most tax savings that could be obtained through mergers could be obtained in other ways with less effort. While they may effect the structure or timing of a transaction, it appears that tax savings alone is rarely an adequate motive for a takeover.

Stock ownership by senior management is a significant factor in takeovers.

The amount of stock owned by management does not appear to deter hostile takeovers. However, it is directly related to the size of the shareholder premium. Another study indicated that many friendly mergers were motivated by the desire of aging top management to diversify their holdings.

Merger diversification patterns are consistent with the existence of synergies.

Companies generally seek targets that reflect their current strategies or complement strengths. It is less clear that bidders seeking synergies are successful in acquiring them through takeovers.

On average, mergers, acquisitions and tender offers do not lead to improved postmerger performance.

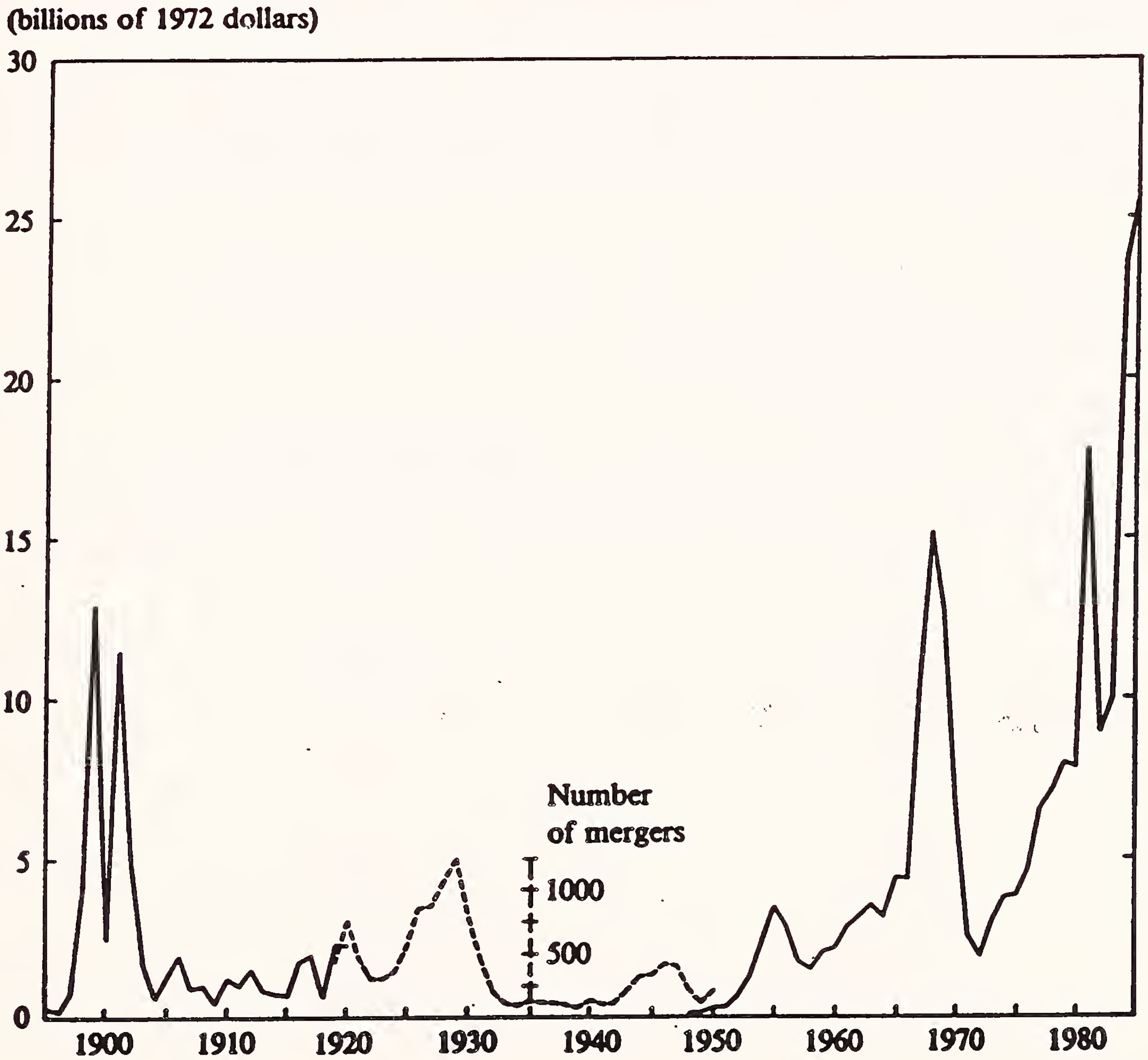
A number of studies using accounting methodologies confirm this. The most comprehensive analyses of this type apply to mergers occurring between 1950 and 1975. However, studies analyzing more recent merger waves confirm this pattern. This pattern is clearly inconsistent with the value-enhancing theories supported by stock price studies.

2. U.S. trend data

A brief review of the historical patterns of U.S. takeover activity between 1895 and 1985 reveals four distinct merger "waves" peaking in 1901, the 1920s, 1968 and the 1980s. (See Table 3-1) Each "wave" was dominated by particular types of transactions. The first wave (1989-1901) was characterized by "horizontal" mergers combining large numbers of competing firms into consolidations that often dominated the markets they served. The second wave (1926-1930) included many "vertical" mergers combining firms that had buyer-seller relationships and "product line extension" mergers uniting firms with related but not competing product lines (e.g. a mustard manufacturer buying a ketchup maker). Although raising different concerns than the turn-of-the-century "monopoly" mergers did, the focus remained on the anti-competitive effects of such mergers. The third wave (1965-1970) marked the rise of the "conglomerate" merger combining firms with related product lines, new markets for similar products or, in their purest form, completely unrelated products (e.g. a food processor buys a timbering operation). Most studies analyzing the economic impact of takeovers rely on data about this wave. The dominant characteristics

of the fourth wave (1981-present) are still subject to debate. With reduced antitrust enforcement, there has been an increase in horizontal mergers. A significant amount of the current activity has been attributed to failed "third wave" conglomerate mergers. However, the rise in number and size of hostile takeovers is probably the single, most frequently cited characteristic.

TABLE 3-1: Constant-Dollar Volume of Manufacturing and Mineral Firm Acquisitions, 1885-1985



Source: D.J. Ravenscraft & F.M. Scherer, Mergers, Sell-Offs & Economic Efficiency (The Brookings Institution, 1987), p. 21.

a. Data on the value of manufacturing and mineral company acquisitions are not available for the years 1921-47. The broken line reflects the number of acquisitions in those years.

Table 3-1 may leave the impression that the two most recent "waves" virtually eclipse the first two. This is not in fact the case. Table 3-2 provides data comparing the four waves and a baseline figure of merger activity for all non-wave years for the average number of mergers, their total value and their value as a percent of gross national product (GNP) for the mining and manufacturing sectors. While there has been a substantial increase in the number and the real

dollar value of transactions over time, transaction value of these mergers as a percentage of GNP is only a tiny fraction of what it was at the turn of the century. This, to a large degree, reflects the expansion and diversification of our economy since 1900. It also indicates that despite the high visibility of these transactions and their clear impact on individual corporations, shareholders and stakeholders, the direct effects of takeovers on the economy as a whole measured in dollar value as a percent of GNP appears to be negligible. However, this trend provides no information concerning the indirect effects of takeovers on long-term investment and the functioning of capital markets which provide the infrastructure for job creation and future growth. It is interesting to note in comparing the two most recent waves that, despite no significant increase in the average annual number of mergers, <u>the annual average real dollar value of assets acquired has more than doubled</u>.

TABLE 3-2: A Comparison of the Four Largest U.S. Merger Waves

		Annual Average Value of Manufacturing and Mining Assets Acquired	
Years	Annual Average Number of Mergers	Value (Billions '72 Dollars)	Percentage of Real GNP
All Nonwave Years	1337	$3.34	0.33
1898-1901	1797 (1.74)	$9.84 (4.47)	6.10 (11.45)
1926-30	2032 (2.95)	$6.12 (2.15)	1.28 (2.12)
1965-70	2931 (7.22)	$8.91 (4.60)	0.86 (1.26)
1981-86	2929 (7.20)	$18.38 (12.42)	0.77 (1.93)

Note: t-value in parentheses measures the significance of the difference between the wave and the nonwave years with higher t-value indicating a more significant difference.

Source: D.J. Ravenscraft, "The 1980s Merger Wave: An Industrial Organization Perspective," in L.E. Browne and E.S. Rosengren, eds., <u>The Merger Boom: Proceedings of a Conference Held in October 1987</u> (Federal Reserve Bank of Boston, 1987), p. 19.

Table 3-3 offers more detailed information for mergers between 1968 and the first six months of 1987 - the peak of the "conglomerate" merger wave to the present. The most striking trend is that of the increase in transactions valued at over $100 million dollars. Table 3-4 gives another view of the trend toward larger transaction size. In examining this graph it is important to remember that 1971-1980 were "nonwave" years of low takeover activity providing a perhaps unrepresentative contrast that further emphasizes the dramatic increase in transaction size that is characteristic of the present takeover wave.

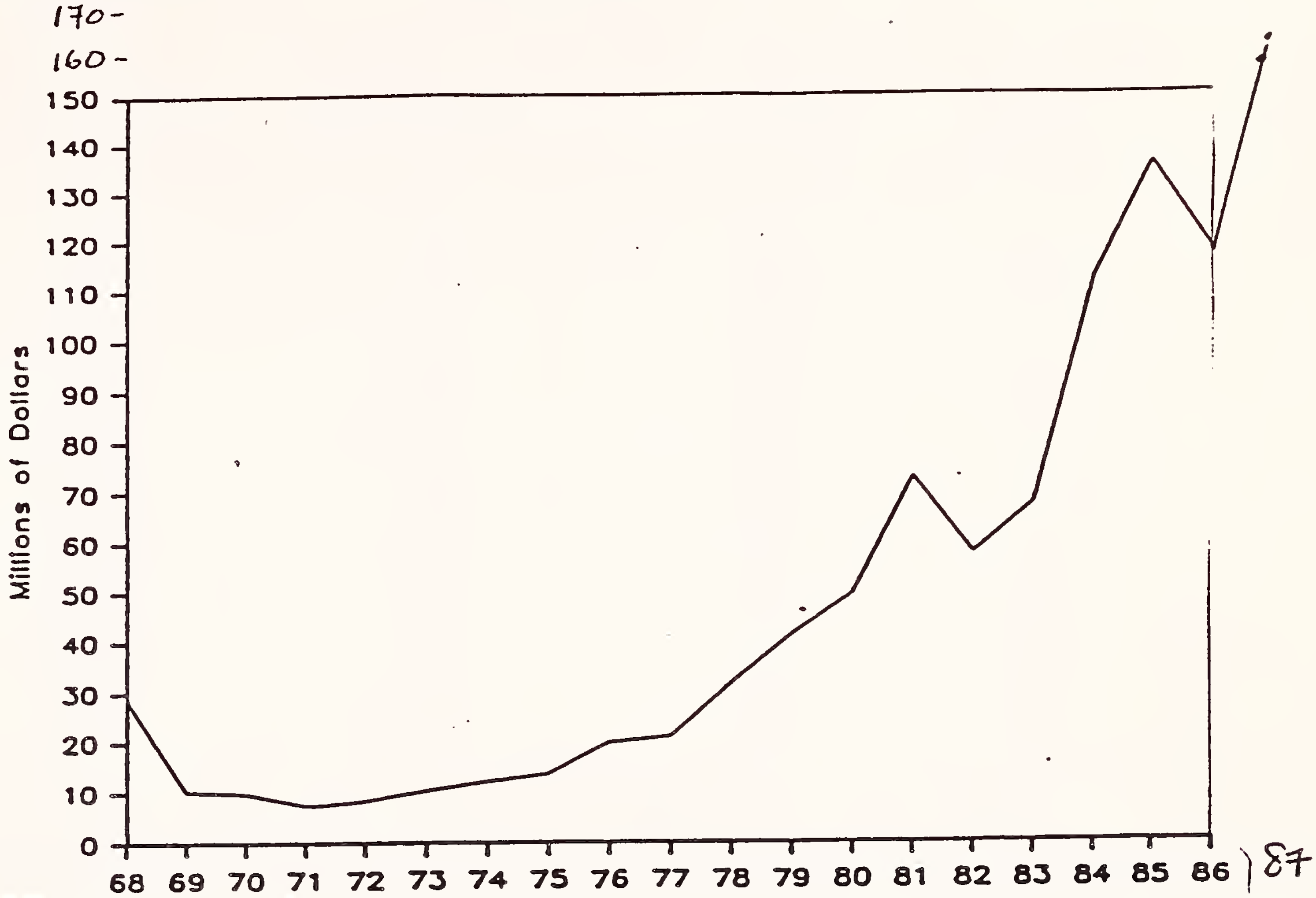
TABLE 3-3: Number and Value of Mergers and Acquisitions, 1968-1987 *
($ millions)

				Average Value		Transactions
Year	Number of Transactions	Total Value	Base **	Current Dollars	1982 Dollars	Valued at at Over $100 million
1968	4,462	$43,609.0	1,514	$28.8	$76.4	46
1969	6,107	23,710.9	2,300	10.3	25.9	24
1970	5,152	16,414.9	1,671	9.8	23.3	10
1971	4,608	12,619.3	1,707	7.4	16.7	7
1972	4,801	16,680.5	1,930	8.6	18.5	15
1973	4,040	16,664.5	1,574	10.6	21.4	28
1974	2,861	12,465.6	995	12.5	23.1	15
1975	2,297	11,796.4	848	13.9	23.4	14
1976	2,276	20,029.5	998	20.1	31.9	39
1977	2,224	21,937.1	1,032	21.3	31.6	41
1978	2,106	34,180.4	1,071	31.9	44.2	80
1979	2,128	43,535.1	1,047	41.6	52.9	83
1980	1,889	44,345.7	890	49.6	58.1	94
1981	2,395	82,617.6	1,126	73.4	78.1	113
1982	2,346	53,754.5	930	57.8	57.8	116
1983	2,533	73,080.5	1,077	67.9	65.4	138
1984	2,543	122,223.7	1,084	112.8	104.5	200
1985	3,001	179,767.5	1,320	136.2	122.2	270
1986	3,337	173,300.0	1,274	117.9	103.0	339
1987	2,032	163,683.3	972	168.4	197.4	301

* Reported transactions valued at $500,000 or more.
** The number of transactions for which the price was disclosed.

Source: adapted from J.W. Allen, "Corporate Takeovers: A Survey of Recent Developments and Issues" (Congressional Research Service, Report # 87-726 E, Library of Congress, 1987), p. CRS-5.

TABLE 3-4: Average Value of Merger Transactions, 1968-1987



Source: adapted from J.W. Allen, "Corporate Takeovers: A Survey of Recent Developments and Issues" (Congressional Research Service, Report # 87-726 E, Library of Congress, 1987), p. CRS-6.

Data which classifies transactions as hostile or friendly are in many respects unreliable. Many deals that begin as hostile takeovers turn into "friendly" mergers and some that begin "friendly" turn "hostile" as negotiations break down. Most data which characterize takeover transactions make a single determination based largely on the type of transaction initiated (i.e. tender offer or proxy contest) with no follow-up. However, there appears to be a significant linkage between the growing number of hostile tender offers after 1974 and the growing number of transactions valued above $100 million. See Table 3-4. Contested tender offers are considered to be hostile, even though the actual basis for contesting the offer may be the inadequacy of the price offered rather than the unwillingness of management to transfer control. Table 3-5 indicates that for the years shown tender offers for publicly traded companies have never amounted to even 5% of the number of reported mergers and acquisitions and contested offers, assumed to be "hostile," were consistently below 2%.

TABLE 3-5: Mergers and Hostile Tender Offers, 1974-1987

Year	Net Merger-Acquisition Announcements	Tender Offers for Publicly Traded Companies	Contested Tender Offer	Successful Contested Tender Offers
1974	2,861	76	12	8
1975	2,297	58	20	14
1976	2,276	70	18	4
1977	2,224	69	10	2
1978	2,106	90	18	13
1979	2,128	106	26	8
1980	1,889	53	12	3
1981	2,395	75	28	13
1982	2,346	68	29	17
1983	2,533	37	11	7
1984	2,543	79	18	10
1985	3,001	84	32	14
1986	3,336	150	40	15
1987	2,032	116	31	18

Source: adapted from J.W. Allen, "Corporate Takeovers: A Survey of Recent Developments and Issues" (Congressional Research Service, Report # 87-726 E, Library of Congress, 1987), p. CRS-7.

TABLE 3-6: Leveraged Buyouts in the United States, 1981-1987

Year	Number	Value ($ millions)
1981	99	$3,093.1
1982	164	3,451.8
1983	230	4,519.0
1984	253	18,807.3
1985	254	19,633.8
1986	331	46,428.9
1987	259	35,636.4

Sources: The Leveraged Buyout Market: 1981-1986. Mergers and Acquisitions, v. 21, Almanac and Index, 1987, p. 70 and The Leveraged Buyout Market: 1983-1987. Mergers and Acquisitions, v. 22, Almanac and Index, 1988.

TABLE 3-7: Value of Mergers and Acquisitions Ranked by Industry 1981-1985

Industry Classification of Seller	Dollar Value Paid ($ millions)	Percent of Total
Oil & Gas	$110,304.8	21.6%
Banking & Finance	43,321.2	8.5
Conglomerate	30,812.6	6.0
Food Processing	26,971.4	5.3
Broadcasting	22,529.0	4.4
Insurance	22,246.3	4.3
Retail	21,984.0	4.3
Drugs, Medical Supplies & Equipment	15,102.1	3.0
Mining & Minerals	14,854.3	2.9
Chemicals, Paints & Coatings	14,545.6	2.8
Leisure & Entertainment	13,250.9	2.6
Transportation	10,925.0	2.1
Other	164,596.6	32.2
Total	$511,443.8	100.0

Source: W.T Grimm & Co.

3. Preliminary Massachusetts data

In collecting baseline information concerning patterns and trends of takeovers and related activities effecting the Massachusetts economy, Commission staff followed two approaches. The first was to assemble a database listing key information about the 845 publicly traded corporations located in the Commonwealth. This database is at the time of this report only partially completed.

The second approach was to attempt to collect sufficient information to develop some sense of the level of takeover and related activity and what patterns or trends if any might be apparent. By using information on Securities and Exchange Commission filings we have been able to formulate a "snapshot" sense of activity of concern to the Commission. This information is presented in somewhat greater detail in Appendix C of this volume.

To summarize briefly, takeover activity in Massachusetts has increased significantly between 1985 and 1988, using SEC filings as a measure of activity. The rate of growth is substantially greater for the state than for the United States as a whole. See Table 1-1.

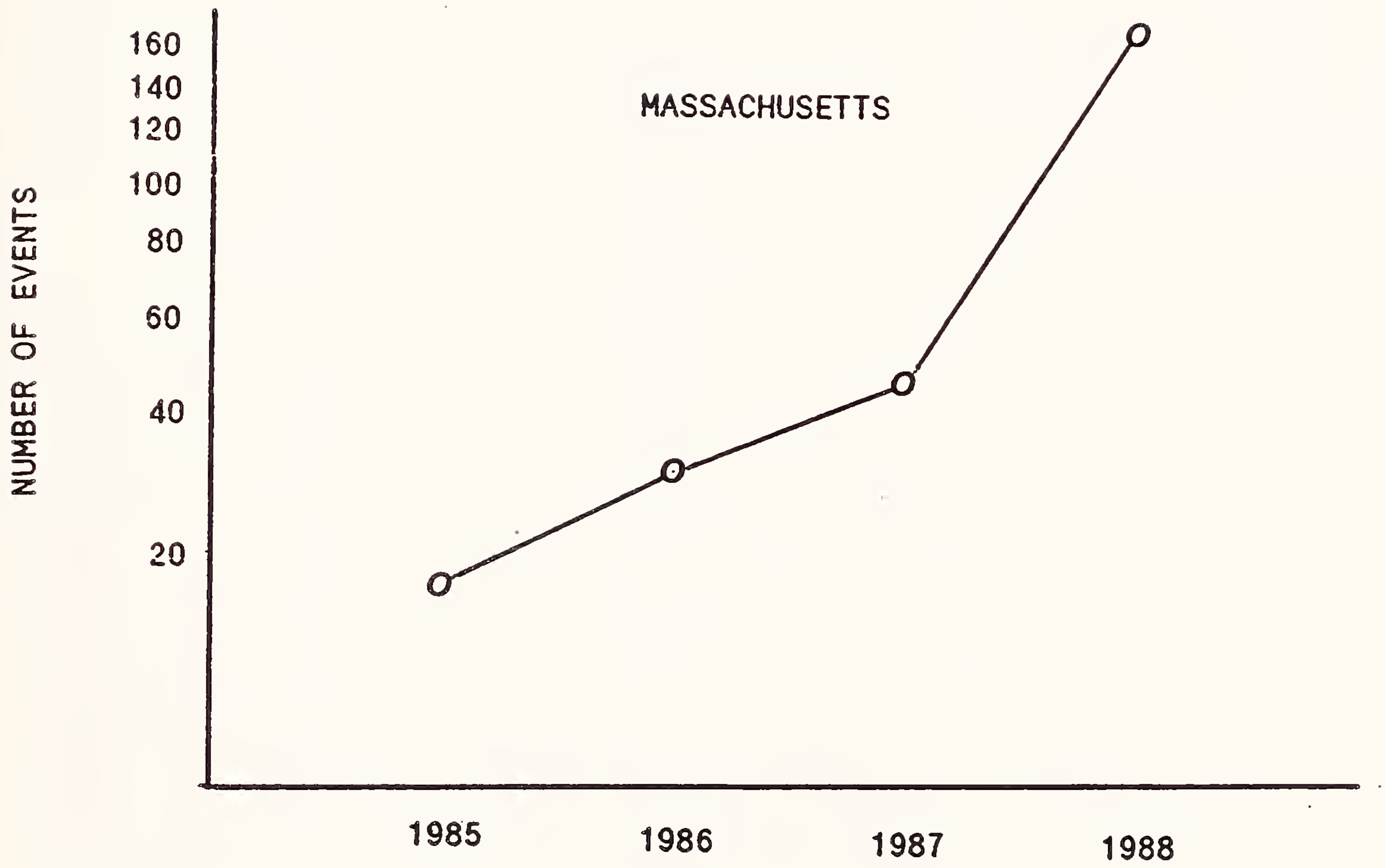
Approximately 60% of all filings effected firms in one of six Standard Industrial Classification (SIC) codes: Rubber and plastic products (30); electrical and electronic machinery (36); photo,

medical and optical instruments (38); food stores (54); apparel and accessory stores (56); and business services (73). Table 2 indicates that filings were heavily concentrated in SIC 36 and 38, electrical and electronic machinery and photo, medical and optical instruments.

Table 3 compares the Massachusetts growth rate for merger agreements and tender offers in the six SIC codes listed above to the national growth rates in this period. Until 1987, Massachusetts appears to have had a slower growth rate than the nation as a whole. However, as the growth rate for filings affecting these industries appears to be flattening out nationally, the Massachusetts rate "took off." Much of this activity appears to have been largely accounted for by transactions in the SIC 36 (electrical and electronic machinery).

Additional information received too late to be included in this report, suggests that Massachusetts levels of takeover activity are comparable to those of the other major industrial states and that for the period 1983-1987 there were approximately the same number of Massachusetts firms that acquired targets as there were Massachusetts firms that were acquisition targets.

Appendix C to this volume contains a more detailed discussion of the data currently available. The Commission staff hopes to collect additional information and provide some level of analysis in the Final Report.



FREQUENCY OF FILING EVENTS BY CALENDAR YEAR

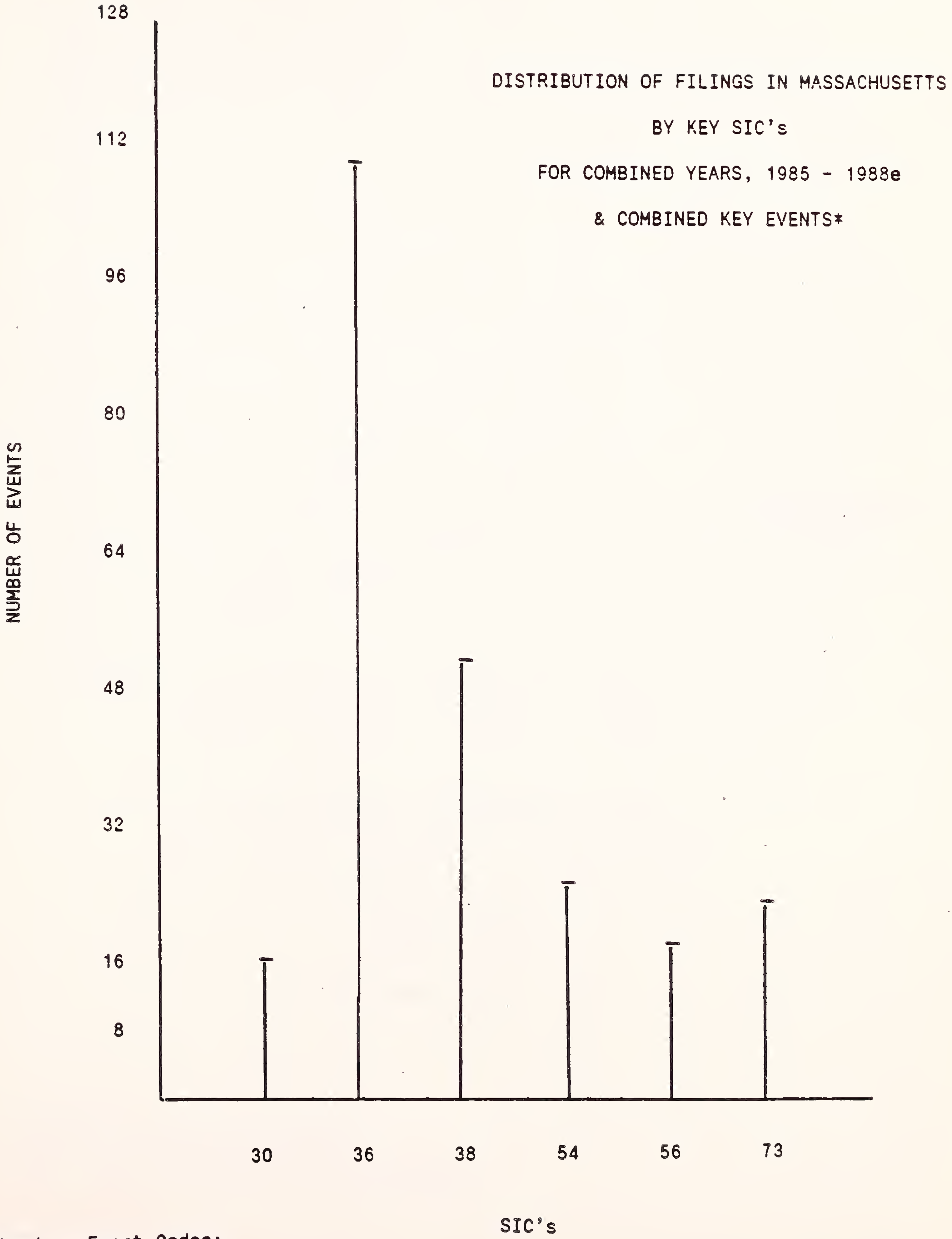
FOR COMBINED KEY FILINGS WITH KEY SIC's*

1985 - 1988e

* defined as Event Codes:
110, 60, 26, 12 & 51

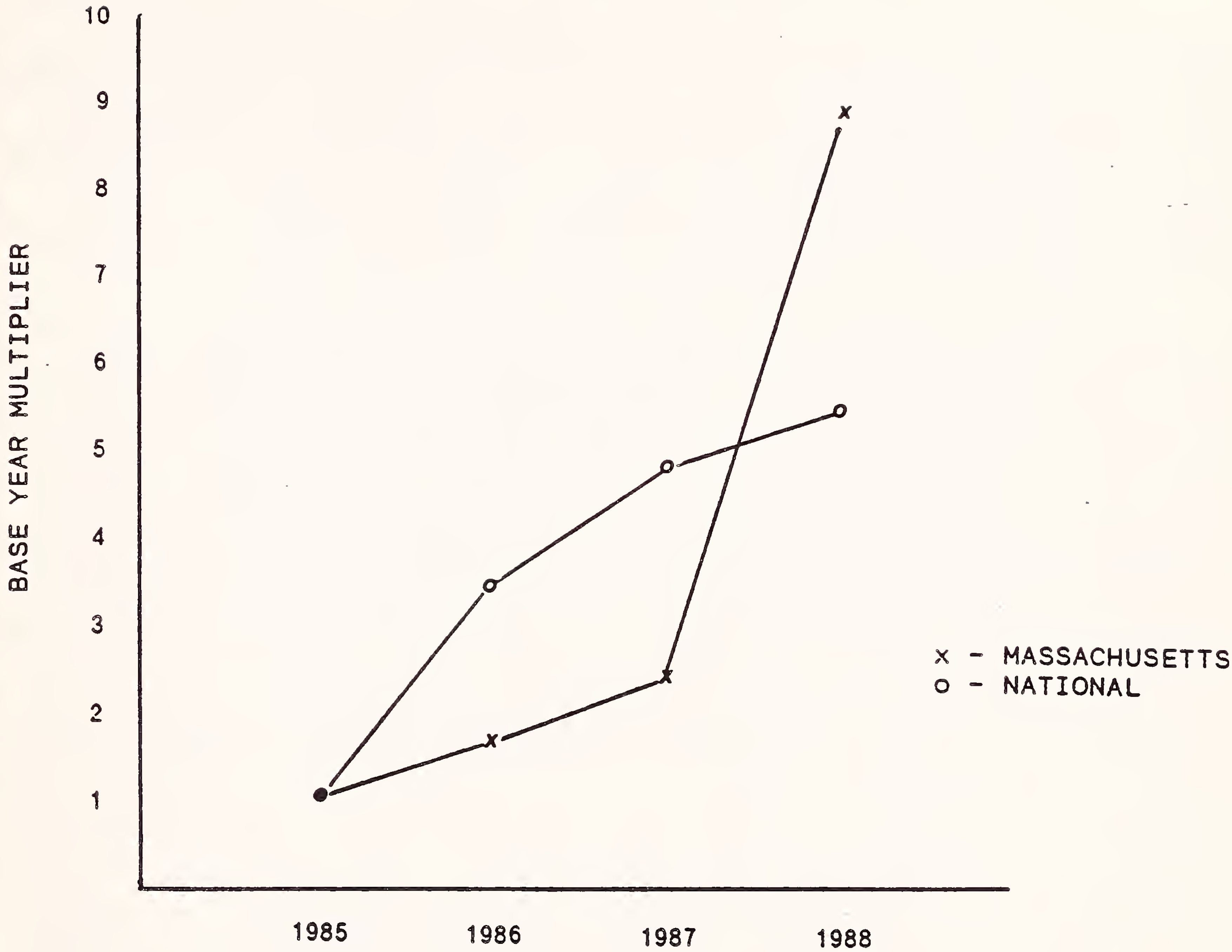
with SIC's:
30, 36, 38, 54, 56 & 73

figure 5.b



* defined as Event Codes:
110, 60, 26, 12 & 51

figure 6.a



RATE OF GROWTH IN COMBINED FILINGS

FOR "MERGER AGREEMENTS" & "TENDER OFFERS"

IN KEY SIC's*

1985 - 1988e

(base year 1985 = 1.0)

fined as SIC's:
30 (rubber & plastic products)
36 (electrical & electronic machinery)
38 (photo, medical & optical instruments)
54 (food stores)
56 (apparel & accessory stores)
73 (business services)

IV. FEDERAL REGULATORY ENVIRONMENT/RESPONSE(S)

A. Perspectives

American economic and political life is built around the principle that competitive markets are the best economic decision- making mechanisms. Two basic corollaries to this belief are: 1) the legitimate role of government, particularly federal government, is to promote competitive economic markets by regulating activities which threaten market integrity; and 2) where regulation does not effectively preserve market integrity, i.e. where there is a market failure, direct regulation may be required as a second-best solution to protect the public interest.

In regulating takeovers and takeover-related activities, the federal government has, for the most part, acted in its traditional role as "guardian" of market integrity. With the exception of certain specific laws affecting regulated industries such as public utilities, banking and communications, the dominant federal policy has been to allow "competitive" financial markets to determine the merits of specific takeover transactions rather than to assume a role in making such determinations itself. It is only in the absence of competitive markets or where a transaction is seen as having an anticompetitive effect, that the federal government has directly regulated takeovers through specific laws aimed at regulated industries or through, at least in theory, the antitrust laws. However, many of the most disturbing aspects of takeovers, particularly employee dislocation, are the focus of the federal unemployment, training and retraining and job placement systems, implemented and partially funded by the states. In essence, despite high levels of interest over the past two decades in takeovers as a phenomenon with broad effects on our economy and society, the federal government has chosen not to regulate takeovers as a distinct category of activities but instead to respond to their effects on markets and individuals as "symptoms." During the eight years of the current national administration there appears to have been a trend in the Executive branch toward treating the idea of regulating takeovers itself as a threat to market integrity. It is less clear that Congress shares this view. However, given the complexity of the issues and the limited availability of reliable data, the federal government has been reluctant to act.

Although not directly related to takeovers as transactions, the growing awareness of the need for capital and labor mobility during what is felt by many to be a period of fundamental economic transition will almost certainly effect future federal responses to takeovers. Financial and capital market regulation raises issues that call into question the basic assumptions that underlie the Securities Act of 1933, that market integrity (efficient capital formation) is best ensured through fair and complete disclosure to individual investors. The meaning of this statement is less clear in a market dominated by institutional investors than it may have been when most investors were individuals. While institutional investors have greater resources to evaluate corporate performance and, therefore, to effectively use required information, they also have fiduciary duties which require

them to watch their own short-term performance. There is concern that this short-term emphasis creates a series of incentives that make public exchanges hostile to firms with risky and/or long-term strategies that do not provide shareholders with immediate returns. To the extent this is either true or perceived as true, the effectiveness of public markets as sources for raising capital for growth is threatened. Government interference with "free markets" is frequently cited by opponents of takeover regulation. However, this argument overlooks the fact that existing capital and financial markets are by no means free from regulation. While the nature and extent of regulation of these markets is a continual source of debate, there seems little indication that they will be fully deregulated in the future. Therefore, just as the federal government has carefully monitored takeovers in other regulated markets such as utilities and banking, similar involvement in capital markets may be warranted.

As with capital and financial markets, technological development and related changes in the structure of our economy and society make a reevaluation of existing federal programs necessary. There is a growing appreciation of the fact that human resource development is essential to increased productivity and to a flexible and adaptive economy responsive to the continually changing demands of global markets. There is evidence that most employees will change not only their jobs but their careers several times in their working lives due to accelerating technological change and shorter product and industry life cycles. This puts a premium on long-term investments in training (as well as other areas) but increases the possibility that the employer who pays for training may not receive the direct benefits. Each of these trends is exacerbated by takeovers which add just one more variable of uncertainty into how and whether investments should be made, regardless of how great the potential return. Providing incentives to invest and assume risk for firms and individual workers is essential if we are to adapt to the economic changes ahead. States are already beginning to put the social and, to varying degrees, the economic infrastructure together that makes this possible. The federal government will do so eventually as well as if inadequate investments are made to ensure efficient labor markets.

B. Securities regulation

1. Introduction

Since takeovers are essentially financial transactions, federal regulation of capital and financial markets have the most obvious and direct affect on these transactions. Although federal securities laws establish many of the procedural and disclosure ground rules with which takeover transactions must comply, these laws were not designed to deal with takeovers in any sense other than as financial transactions. The basic goals of federal regulation in this area are to preserve investor confidence and facilitate the capital formation necessary to create jobs and to fuel the economic growth vital to our competitiveness in an interdependent global economy. First adopted in 1933, the federal securities laws require companies using public

markets to raise funds from investors to make a full and fair disclosure to investors. Federal securities laws also establish requirements for trading markets and market professionals to prevent fraud, insider trading and other unfair practices which would harm investors and, therefore, the overall efficiency of the capital formation process. These laws also establish standards for the financial institutions and firms that participate in public markets, including capital requirements for broker-dealers and close supervision and regulation of banks and other financial institutions to protect investors who use these entities as intermediaries. Although there is ongoing debate as to the extent to which regulation of financial and capital markets is desirable, the high degree of federal regulation in this area appears to reflect a consensus that these markets constitute the economic infrastructure that makes economic growth possible. As such, regulation is warranted to preserve this national resource. In contrast, the general rule in most other areas is that less regulation is better. In this context, takeovers have only been regulated to the extent that takeovers and takeover-related activities have been viewed as threatening the integrity of capital markets through unfair treatment of shareholders. The legislative history of the only bill explicitly enacted in response to takeover concerns, the Williams Act, clearly states that it was not Congress' intention to stop takeovers, but rather, to protect shareholders and market integrity by ensuring a "level playing field" for bidders and targets.

The wave of takeovers that began in the 1960s marked a significant innovation in the financing of unsolicited offers revealing an inadequacy in the federal securities laws adopted in 1933 and 1934. These laws required disclosure to potential investors in connection with a sale or offering of securities. However, they did not apply to the cash tender offers which became common during this period. Bidders were able to acquire control of a public corporation by making cash offers at a premium above market price on a first-come-first-served basis. Shareholders were forced into the position of making hurried decisions about whether to tender or not with minimal information about the bidder. The corporations that were or felt they might be targets of such transactions approached Congress seeking protection. Legislation was filed in the Senate designed to protect corporations from hostile "raids" by amending the Securities Exchange Act of 1934. However, it was not enacted in this form. As enacted in 1968, the Williams Act was a carefully neutral regulatory scheme reflecting Congress's belief that hostile tender offers provided potential benefits to shareholders and the economy as a whole. Its focus, consistent with the underlying premises of the Securities Exchange Act itself, was shareholder equity. In the report accompanying the final legislation, its drafters noted:

> The Committee has taken extreme care to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid. The bill is designed to require full and fair disclosure for the benefit

of investors while at the same time providing the offeror and management equal opportunity to fairly present their case. (S. Rpt. 90-550, 90th Cong. 1st Sess., p.3)

The Williams Act establishes certain timing and disclosure requirements that bidders must meet. Section 14(d) requires a bidder to notify the Securities and Exchange Commission (SEC), target shareholders and the target corporation at commencement of its offer. This notification must include, the offeror's identity, the source of funds to be used for the purchase and the extent of the offer's holdings in the target corporation. It permits shareholders who tender their shares to withdraw them within certain timeframes. Under the Act, all tendered shares must be purchased at the same price.

Regulations promulgated by the SEC under the Act require that offers remain open for a minimum of 20 days after commencement and an additional 10 days after any change in the terms of the initial offer. As enacted in 1968, the Act also provided that in a partial tender offer (less than 100% of the outstanding shares), if more shares were tendered than the bidder committed to purchase, all shares deposited in the first 10 calendar days had to be purchased on a pro rata basis. In 1982, this provision was amended to require proration for the full term of the offer. The Act also requires that if the tender price in increased during the offer period, this "best price" must be paid for all shares whether tendered before or after the offer price was increased.

The Williams Act also establishes certain disclosure requirements for purchases of substantial amounts of stock. Any person acquiring 5 percent or more of any class of registered stock, whether on the market or in a privately negotiated transaction, must file a disclosure statement with the SEC, the issuer and the exchanges listing the stock within 10 days of the acquisition. This disclosure statement (Schedule 13D) requires the purchaser to disclose the amount of stock purchased, the source of funds used and any intended transactions such as mergers or asset sales involving the target.

The Williams Act does not explicitly pre-empt state regulation of tender offers. However, state regulation of tender offers which makes compliance with the Williams Act impossible or which undermines the Congressional intent of establishing a neutral regulatory framework which favors neither bidders nor targets has been held unconstitutional in Edgar v. MITE, 457 U.S. 624 (1982).

2. SEC Rule 19c-4

The Securities Exchange Commission recently promulgated its new "Shareholder Disenfranchisement" rule (Rule 19c-4) after more than a year of debate. Rule 19c-4 is designed to prevent public corporations from issuing new classes of stock that would diminish the voting rights of their current shareholders. Effective July 8, 1988, this rule is viewed by many as a "one-share/one-vote" requirement which will prevent corporations from adopting defensive strategies involving

watering down of shareholder voting rights, e.g. "poison pills," or the creation of classes of stock with disproportionate voting rights and placing them in pro-management hands, e.g. "dual class recapitalizations." Any corporation engaging in this type of conduct after July 8 would be prohibited from trading or listing their shares on any of the national exchanges.

The rule contains the following exceptions:

1) Companies with classes of stock with different voting rights as of July 8 are "grandfathered" and may continue to trade on national exchanges.

2) Companies making initial offerings may issue some shares with greater voting powers than others given adequate disclosure.

3) Companies may issue securities for any purpose, including the financing of a merger or acquisition, if the voting rights of the new shares are not greater than the per share voting rights of any class of outstanding stock.

4) Corporate actions taken pursuant to an Indiana-type control share acquisition law, such as the M.G.L. c. 110D, are specifically exempted. However, if a foreign corporation were to seek protection under M.G.L. c. 110E the SEC would prohibit it from listing or trading its shares on national exchanges.

5) Rule 19c-4 does not apply to companies incorporated in countries outside the U.S. even though they trade on U.S. exchanges and may be headquartered in the U.S.

3. Tender Offer Reform Act (H.R. 2177/S. 3212)

Congress has been considering proposals to amend the Williams Act to provide corporations and shareholders with greater protections from hostile takeovers for most of the past decade. One source of controversy stems from a debate over whether Congress' original decision to enact a "neutral regulatory framework" favoring neither biders nor targets was the right one. A second source of controversy revolves around the continuously changing and developing takeover practices which may require clarification and expansion of Williams Act provisions to ensure effective implementation of the original intent. At this time, there appears to be a growing consensus that certain takeover practices developed since 1968 are inconsistent with the goals of the Williams Act and federal securities regulatory framework. Although no action is expected in this Session, the next Congress is likely to produce legislation addressing these issues at least. However, there appears to be little consensus on the larger issue concerning the appropriateness of Congress' original decision to establish a neutral framework. As a result there is little, if any,

consensus on the related issue of whether a "neutral regulatory framework" adopted at the federal level should prohibit state regulation which is not neutral.

Table 4-1 compares the major provisions of the principal bills to reform the Williams Act currently before Congress with current law and the position of the Business Roundtable.

Senator Armstrong filed a series of amendments to S. 1323 which would prohibit golden parachutes, poison pills and greenmail absent prior shareholder approval. These amendments appear to give the SEC virtually unlimited power in interpretation and implementation, apparently including the authority to grant waivers on a case-by-case basis. Senator Proxmire requested a count in the Senate to determine support for the Armstrong amendments following a 97-1 vote for the golden parachute amendment on June 15 followed by a 40-57 vote against Proxmire's motion to table the amendments. (The sole dissenting vote on the parachute issue was Senator Roth of Delaware who argued against them on a states' right basis.) Despite Senator Proxmire's opposition to these takeover practices and language in S. 1323, as drafted, that would limit their use, the Senator has stated that he would prefer to withdraw the entire bill from Senate consideration rather than see it go forward with the Armstrong amendments. Compromise language that would send the issues of corporate takeover defenses to the SEC for a one-year study has been developed. It seems unlikely that any conclusive action will be taken on tender offer reform in the 100th Congress. However, the Armstrong amendments raise significant issues concerning the state role in corporate governance, particularly in the context of the state regulation of takeovers which should be carefully monitored in subsequent Congressional action.

The principal issue raised by both the Armstrong amendments and the new SEC rule is the usurpation of state regulatory authority over corporate governance, an area traditionally viewed as within the exclusive jurisdiction of the states. Piecemeal federal regulation of state created entities has long been a very controversial issue. Congress has never been able to enact a federal "incorporation" law, despite several attempts and there is no indication that Congress is considering such a step in the future. However, the governance provisions addressed through the Armstrong amendments and SEC rule 19c-4 go to the heart of state regulatory authority over the corporations they create.

The other issue raised by both actions is the wisdom of prohibiting certain corporate defensive tactics, no matter how abusive they may appear, without taking effective parallel actions to curb abuses by raiders. The end result, intended or not, may be to facilitate takeovers. This would be consistent with the strong pro-takeover positions of Senator Armstrong and the SEC. However, it is not clear that is in the long-term interest of corporations, their shareholder and stakeholders or the American economy.

COMPARISON OF PRINCIPAL BILLS TO AMEND WILLIAMS ACT

		Issue	Present Law	Dingell/Markey H.R. 2172	Proxmire/Riegle S. 1323	BRT Position
DISCLOSURE	1.	13(d) threshold and window (ownership level/filing time)	After acquiring 5%, must notify in 10 days. Each addtl 1% reportable	5%/24 hours; no addl purchase for 2 bus. days	3%/close next bus. day; no purchase until file	2%/2 days
PREEMPTED	2.	Require broader disclosure	Minimal disclosure including financing but exempting banks	"Plain English" statement must be filed spelling out terms of bid, including junk bond financing, and participation of others	Discussions with others, fees/expenses incurred, all sources of financing, plans for investment or control	-----
	3.	Expand definition of group	2 or more act as a group SEC must detect and prove	SEC and courts may consider extent to which group acted in "consciously concerted" manner	"Consciously parallel" actions	Must report contacts with others filing 13(d) reports. Permit SEC to use standard of "conscious parallelism" in determining group activity
	4.	Extend minimum offering period	20 business days	60 calendar days	35 business days	Either 35 bus. days or 60 calendar days
	5.	Expand enforcement	Private right of action for fraud only. Limited remedies. Light penalties	Civil penalties not to exceed 1% of value of securities for each day of late filing	Private right of action for intentional disclosure, tender, margin violations. If say investement & change, no tender offer for 6 mos.	Substantial civil penalties for late or false filing
	6.	Limit open market purchases	Prohibited during "tender offer"	Acquisition above 15% must be by tender offer	Above 15%, must be by tender offer	Above 15%, must be by tender offer

DEFENSIVE TACTICS — PREEMPTION DEPENDS ON LANGUAGE

7. Restrict 2 tier offers	Pro rata acceptance required	-----	-----	Above 15% must be by tender for any and all shares at same price
8. Restrict greenmail (Max % shares repurchasable; min. holding period to exempt; other provisions)	No specific provisions	3%/2 years unless similar offer to all holders or approved by shareholders	3%/6 months unless shareholders approve or by self-tender offer	Prohibit receipt of greenmail payments; disgorge any profits to issuer
9. Restrictions on golden parachutes during offer	No specific provisions	Cannot adopt during pendency of tender offer. Cannot pay in excess of IRS guidelines. Grandfather clause for previously adopted parachutes	Yes	Covered by IRS regulations and the business judgment rule
10. Restrictions on poison pills	No specific prov. SEC considering ban	Cannot establish or implement during pendency of tender offer unless approved by shareholders	Cannot establish during offer	Covered by state law
11. One share/one vote	No requirement	Prohibits trading of company's shares on a national exchange unless each voting share has one voate and all common stock is voting. Full compliance within 3 years of enactment	-----	Oppose federal requirement. Voting rights covered by state law. Rules for listing determined by excahnges
12. Limit junk bonds	No specific provisions except Federal Reserve on shell corporations	-----	-----	-----
13. Limit leveraged buyouts	No specific provisions	-----	-----	-----

14. Restrict financing options	No restrictions on use of issuer assets; "highly confident" letter common	-----	-----	Oppose federal regulation of leverage
---> 15. Reaffirm role of states	CTS v. Dynamics upheld Indiana statute thereby affirming state role on corporate governance	No. Creates open-ended SEC authority to proscribe defensive tactics. Expands SEC's general authority to make rules. Expands purpose of Act to include regulation of fair contests for control. Net effect is federal pre-emption	Yes MARKUP: All language re state roles or preemption deleted; defensive tactics language weakened	Yes. Support language in Proxmire bill affirming primacy of state laws in matters of corporate governance and internal affairs.
16. Change ERISA requirements	No specific provisions	-----	Cannot use pension surpluses for takeovers; fiduciary can consider long-term	Cannot use pension surpluses for akeovers; fiduciary permitted to consider long-term in deciding whether to tender shares
17. Increase insider trading penalties	5 years &/or $100,000	-----	10 years &/or $1,000,000; minimum 1 yr for perjury/ obstruction of justice	-----
18. Sweeping the street	-----	Requires 30-day "cooling off" period before person withdrawing a tender offer may re-enter the market	-----	Cooling off period not necesary if "any or all" requirement is in bill
19. Defensive tactics	-----	Open-ended authority to SEC to proscribe any defensive tactics during tender offer which frustrates purposes of the Act, to include poison pills, lock-ups	-----	Opposed to granting SEC open-ended authority

		and tin parachutes		
20. Trading halts	-----	Provides that trading halts on a national securities exchange must be observed by the third market	-----	-----
21. Access to proxy machinery	-----	Requires that owners of 3% (or $500,000) of a company's shares, whichever is greater, have full access to proxy machinery for director nominees	-----	Proxy system works well. No need for change
22. Market rumors		Requires companies to give a definite "yes" or "no" to official inquiries concerning takeover activity. "No comment" not permitted	-----	-----
23. Confidentiality of proxy voting		-----	-----	Proxy system works well. No need for change
24. Other		-----	Require registration of arbitrageurs	-----

C. Antitrust - competitive market regulation

The debate regarding the impact of mergers and acquisitions on market competition goes back to the years following the Civil War when "trusts" were used to control separate corporations under common ownership. Trusts were legal devices permitting common control of the common stocks of many corporations at a time when most state incorporation laws limited corporate size and geographic scope of activities. They were effective mechanisms for attaining the economies of scale critical to attracting the massive private capital investments needed to build our national railway system and the oil industry. However, their very effectiveness as capital creating mechanisms made them virtually irresistible mechanisms for exerting monopoly power over consumers and suppliers to maximize return on the original investment. The exercise of such monopoly power could be justified, as the "robber barons" occasionally did, as a necessary incentive for assuming the risks associated with industrial development. However, the national consensus was that competitive markets best served the economic needs of the country. The Sherman Antitrust Act of 1890 banned trusts and other legal devices used to restrain trade and with their decline, the Act was used to deter monopolistic mergers of competing firms to protect the integrity of competitive markets.

Through the 1950's, the debate over mergers focused on their potential for lessening competition and, therefore, threatening the well-being of an economy built around the premise that competitive private markets are the best mechanisms for promoting the efficient allocation of limited resources to those uses with the highest return to society. However, with the 1960s conglomerate merger wave a new theory emerged which suggested that mergers were pro-competitive because they promoted competition for control of corporations, creating a "market for corporate control" which disciplined managers and ensured efficient operation of individual firms. The growing significance of this theory together with the changing definitions of market competition in a global economy has resulted in a dramatic shift in antitrust enforcement policy in the last decade which is often thought to create an atmosphere conducive to takeovers. For the Reagan Administration with its whole-hearted adoption of the "Chicago School" of economic thought, the overriding purpose of antitrust law is to prevent the inefficient allocation of resources. The Chicago School does not accept the central assumption of the Sherman and Clayton Acts that the concentration of economic power is harmful. It instead takes the view that business consolidations are presumed to be efficiency-enhancing and should be permitted, if not encouraged. If a proposed consolidation is harmful to competition, current antitrust policy would dictate investigating into the presence of cost-savings to offset any potential competitive harm rather than a presumption that a consolidation with anti-competitive effects should not be permitted to go forward.

The Reagan Administration's merger policy is embodied in the Department of Justice Merger Guidelines (1984). Through mathematical formulae, the Herfandahl-Hirschman Index, the Guidelines measure the

increases in market concentration that are likely to result from any particular merger or acquisition. The Guidelines are designed to identify those mergers and acquisitions that might permit the merged firm to exercise its market power and harm consumers by raising prices. While the Guidelines do recognize the potential for anti-competitive mergers that harm consumers, they have been criticized for giving too much weight to internal efficiencies that may be gained from otherwise anti-competitive mergers. Consistent with the goal of promoting efficiency, the Guidelines give a qualified "green light" to anti-competitive mergers if there is "clear and convincing" evidence that the merger will achieve significant efficiencies.

D. Income maintenance

The role of the federal government in this area is again one of protecting market integrity, in this case that of labor markets. In this sense, the federal role would rarely be explicitly described as one of providing income maintenance which in this country has a welfare connotation. The federal role is generally viewed as one of facilitating and expediting the transfer of dislocated workers to productive jobs, i.e. promoting labor mobility. An assumption underlying this role is that economic evolution is a dynamic process of "creative-destruction" which fosters productivity and ensures long-term job creation and growth. This process involves the continuous reallocation of economic resources, including human resources, from old to new uses to adapt to technological and societal change and their effects on product, process and industry life cycles. In short, sustaining a dynamic, growing economy requires employee dislocation. In labor market terms, the problem is not that such dislocations occur. Worker dislocations free the precious human resources that permit growth in emerging sectors of the economy. The problem is that dislocated workers may lack the information and/or skills they need to take advantage of the opportunities that may exist, increasing the short-term costs to individual workers and slowing economic growth for society as a whole. The federal government has, since the New Deal, played an active role in promoting labor mobility through employment and training programs and, more recently, health care maintenance to foster productivity and economic growth.

In response to the massive dislocations of the Great Depression, the federal government established what is often referred to as the "unemployment insurance system." Designed to provide temporary support and information to workers while they look for new jobs, this system is really a set of programs established and coordinated by the federal government, implemented largely by states, and funded jointly by the public sector and an employer contribution. It's central program, the Unemployment Insurance Service, provides a critical financial cushion for eligible workers while they look for new jobs. Created as a social insurance program funded by employers and employees, it was viewed as a mechanism for ensuring labor mobility for the benefit not only of the workers themselves but for businesses

in need of workers. It was, in essence, a cost sharing mechanism between employers and government to encourage the labor mobility essential to long-term growth and job creation by mitigating the short-term costs of dislocation to individual workers. The two other major components of this system, the Employment and Research Services, are designed to ensure that adequate information was available to workers and to the government to promote efficient labor markets. The Employment Service provides individual workers with information about specific job opportunities to minimize the amount of time between jobs. The Research Service provides the individual states and the federal government with the information about labor market trends needed to focus and evaluate the various state and federal employment and training efforts and foster efficient labor markets.

The decades following World War II have been characterized by accelerating rates of technological and social change as the United States has moved from an industrial to a knowledge-based economy. The resulting structural economic changes have been augmented by the growing interdependence of the world economy. Inefficiencies in the functioning of labor markets were not so much the unavailability of jobs for workers but the mismatch in skills between potential employers needing labor and dislocated workers. Often this was further aggravated by the geographical concentration of many of the emerging, technology-based industries leading to the so-called "bi-coastal" economy. The federal response in this context has been a series of employment and training initiatives designed to facilitate/expedite the relocation of dislocated workers by providing information and training or skills upgrading where needed to address such mismatches. These programs include the Job Training Partnership Act and the Trade Adjustment Act, both established by federal law but implemented primarily by the states. With enactment of the Omnibus Trade Act of 1988, many of the dislocated worker programs and other programs relating to workforce training and education have been modified or consolidated. Until the U.S. Department of Labor promulgates final regulations for the implementation of these programs and the states respond by submitting their proposals, the implementation plans for these programs is unavailable. Therefore, they will not be discusses in detail in this Interim Report. A new program established in the Trade Act, the Worker Assistance and Retraining Notification Act (WARN) will be discussed briefly below. Despite the limited availability of information on exact implementation plans, WARN represents a new federal response to the threat posed to labor market integrity from sudden dislocations of large numbers of employees through plant closings and layoffs of particular relevance to the Commission's deliberations.

The Worker Assistance and Retraining Notification Act (WARN) requires employers to provide 60 days notice to employees and communities affected by plant closings or layoffs under statutorily defined circumstances. Until the U.S. Department of Labor promulgates final regulations for the implementation of WARN, much is still unknown about which closings or layoffs will actually require employer notice, how the Act will be administered and what role the states will play in that process. However, this Act represents a clear policy

decision by the Congress that corporations have a responsibility to notify their employees and affected communities before a closing or layoff to minimize the dislocations that result. It also reflects a consensus that the programs designed to minimize the negative effects on individual workers of closings/layoffs and to protect labor market integrity function most effectively with advance notice of anticipated dislocations.

WARN requires employers with a) 100 or more full-time employees or b) 100 or more full- and part-time employees who together work at least 4,000 hours per week to provide employees with 60 days advance notice before any of the following triggering events:

1) the permanent or temporary shutdown of a single site which results in employment loss for at least six months of 50 or more full-time employees;

2) the layoff during any thirty day period for at least six months of at least 1/3 of a site's employees (at least 50 workers must be affected by the layoff).

Exceptions:

1) Closings/layoffs by firms due to "unforeseen economic circumstances"

2) Closings/layoffs by firms "actively seeking capital" needed to remain in business.

3) Closings/layoffs from temporary facilities where affected employees were hired with the understanding that their employment was temporary.

4) Closings/layoffs resulting from a strike or lockout.

Employers who fail to give employees the mandatory 60 days notice must pay affected employees full wages and benefits for each day in the sixty day period for which notice was not given. An employer not meeting the Act's requirements must also either pay the local community $500/day for each day it failed to give notice or provide full pay and benefits due employees within three weeks of the date the employer ordered the shutdown or layoff. Aggrieved employees and communities may sue an employer in Federal District Court for relief.

The interpretation of the various exceptions, particularly the first two listed above, will have significant effects on the applicability of the Act to closings and layoffs following takeovers and related activities.

The overwhelming focus at the federal level is on improving the efficiency of labor markets through the transfer of relevant information to and funding of training programs for individual workers to expedite and facilitate re-entry into the workforce. However, the existence of the welfare system is an acknowledgment that under

certain circumstances reliance on labor markets may not be sufficient to guarantee a subsistence income. In other words, there are market failures that result in workers without jobs who need assistance beyond the employment and training services offered through other programs. The Social Security Act-Title IV provides grant procedures to states and eligibility criteria for Aid to Families with Dependent Children (AFDC). The Food Stamp Act also provides some assistance to eligible individuals. These and other programs such as Medicaid and various disability benefit programs constitute the so-called "safety net" of entitlement programs designed to guarantee Americans a subsistence income in those instances where they are unable to successfully participate in the labor market. These programs continue to be very controversial, in part perhaps because of the departure from the more comforting assumption that the labor market will take care of the problem. Much of the controversy continues to turn on issues like workfare and the kinds of job-seeking requirements that should be placed on recipients in determining eligibility - issues closely related to the meaning of a labor market failure to individuals and their families and to society.

E. Health care maintenance

Increased emphasis on the maintenance of health care benefits is a function of many trends including the rising costs of health care. However, of great significance is the growing role of the employer as the provider of group health insurance, in the absence of a national health insurance system. While by no means the only source of health care benefits, the first benefit demanded by employees and offered by most employers is that of a shared cost group health insurance plan. Such plans meet critical needs of employees and their families but also serve the interests of employers needing healthy and productive workers. Recognition of the role of employers in this context led to enactment in the Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1986 of a provision requiring employers to extend benefits to employees following termination at the group rate if the employee paid the premiums. The rationale behind this provision appears largely to be analogous to that of unemployment insurance. It provides temporary assistance in the form of continued health care benefits to employees and their families while they are seeking new jobs, facilitating labor mobility. Again, provisions have been made through Medicaid to put a "safety net" in place where labor markets will not function adequately to resolve the problem.

F. Summary

In responding to takeovers and related activities, the federal government appears to have assumed a role of protecting the integrity of economic infrastructure by regulating capital and labor markets and maintaining the competitiveness of industrial markets. The federal government has taken a dominant role in establishing legal frameworks within which transactions take place (e.g. the securities and

antitrust laws). However, where protecting market integrity requires providing individuals with specific services (e.g. unemployment insurance, employment and training) the federal government has established criteria and guidelines but left the actual program implementation to the states not only because of the need for decentralized service delivery but also because labor market "inefficiencies" vary substantially by region. In many instances, the states have gone much further in terms of the services they provide than the federal government requires or permits. It would appear that many of the specific transaction-related concerns about takeovers regarding their effects on the operation of capital markets, shareholder equity and financing mechanisms are most effectively addressed at the federal level. However, issues relating to the consequences and effects of takeovers, particularly on stakeholders, may be best addressed at the state level.

V. STATE REGULATORY ENVIRONMENT/RESPONSE(S)

A. Perspectives

States approach the issues raised by takeovers and their regulation from quite a different perspective than that of the federal government. The targets of takeover attempts, corporations, are creatures of state law. They are widely recognized not only as mechanisms for returning profits to shareholders, but as important mechanisms for attracting capital for the production of goods and services and as complex social and political systems as well. Corporations are the fundamental unit around which our economy is organized. They are the mechanisms through which economic development strategies and investments assume meaning. The inherently disruptive nature of takeovers creates substantial potential for disrupting the operation of the modern corporation in its many functions raising questions about their value absent independent evidence to support the hypothesis that they are effective means for producing new efficiencies and new value.

B. General incorporation laws

1. Introduction

The modern business corporation is the basic organizational unit of our economy as well as a complex social and political organization. Corporations employ millions of workers, support the economies of thousands of communities, provide goods and services to consumers across the nation and deploy the savings of investors throughout the world for the production of goods and services. The corporation provides a mechanism through which entrepreneurs can obtain capital for development and commercialization of new ideas and technologies, and through which management can invest and guide the use of human and capital resources for long-term profitability and economic growth.

Corporations are creatures of state law. The early corporate charters were "special" charters granted by special acts of the legislatures for certain limited purposes. However, with the rise of the corporation during the Industrial Revolution, granting "special" charters on an individual basis was no longer practical. Therefore, states gradually adopted "general incorporation laws." New York was the first state to adopt such a law in 1811 and by 1900 virtually every state had one. They determined not only the organization and governance of the corporation; they also regulated its business activities in the state of incorporation and in other states as well. As it became better established that a corporation could incorporate in any state, regardless of where its principal business was located, states began liberalizing their general incorporation laws to attract corporations and thus revenue. By 1915, the Delaware law was seen as the most modern and liberal; Delaware has since made a state industry out of incorporating businesses with operations located across the country.

Around the turn of the century, there was substantial debate about the need for federal limitations upon the actions of large business corporations actively engaged in interstate commerce. Presidents Theodore Roosevelt, Taft and Wilson each endorsed some type of federal regulation of corporations. However, at the federal level, concerns about corporate governance and the relationship between management and shareholders was secondary to concerns about corporate size and market control which led to enactment of the Sherman and Clayton Antitrust Acts. Thus while the federal government addressed the issue of corporate power vis-a-vis business competitors and consumers, the business of chartering corporations and addressing the issue of corporate power vis-a-vis shareholders was left to the states. Despite periodic debates over the need for a "federal incorporation law," the issues surrounding the chartering, organization and governance of corporations has traditionally been and still remains an area left to the exclusive jurisdiction of the states.

Organizational and governance provisions of incorporation laws have particular significance in the takeover context as they apply to the fiduciary duties of corporate directors, the role shareholders play in decisions surrounding control transfers, the rights of minority shareholders in the event a transfer of control which they opposed takes place, the obligation of a bidder to assume the liabilities of the acquired corporation and shareholder roles in making decisions about the adoption of corporate "defenses." These are the kinds of provisions usually being referred to in discussions about "corporate governance," "management accountability" and "shareholder democracy." Different states have taken differing approaches to these issues. However, the controversies around these issues turn on which of two views of the functioning of a modern corporation is adopted. The first, and more traditional, view is that shareholders voting their financial interests serve as the best measure of the corporation's interests. This view holds the corporation is a shell for investors; it is particularly relevant where there is substantial overlap between the individuals who own the shares and those who control the operation of the corporation. However, many have argued that this view is not particularly relevant to the modern corporation, many of whose thousands of investors hold their shares for relatively short periods of time and have made their investments for purely financial purposes. This view of the modern corporation has led to a second approach which places much greater emphasis on the board of directors and management as the only effective decision-making bodies. The approach adopted shapes the content of corporate "governance" provisions.

The most important governance areas in the takeover context will be briefly discussed in the next three sections. It is not possible to do more than mention them briefly with some sense of why states chose to adopt such provisions. However, each reflects an interesting relationship and distinction between federal and state regulation affecting takeovers. Federal securities regulation defines and regulates the relationship between issuers of stock and investors to protect the operation of capital markets. State general incorporation laws define and regulate the relationship between management and

shareholders to protect the productive capacity embodied in corporations by creating a balance between ownership and control that permits the effective day-to-day operation of a corporation but guarantees shareholders a sufficient role to make corporations attractive investments.

2. Fiduciary duty - accountability to whom?

Although specific provisions defining the relationship between corporate shareholders (the owners) and management (those who control) may vary somewhat from state to state, all state incorporation laws include language which states that corporate directors have a fiduciary duty to shareholders. The language used in the Massachusetts General Incorporation Law is fairly typical:

> [A corporate director must act] "...in good faith and in a manner which he reasonably believes to be in the best interests of the corporation..." [and with] "...such care as an ordinarily prudent person in a like situation would have used under like circumstances." M.G.L. c. 156B, § 65.

The concept of fiduciary duty reflects the idea that there should be some standard of accountability to shareholders for directors who use investor monies to fund productive enterprises. The need for this type of provision also reflects the reality of separation of ownership from control in modern corporations. However, there is an ongoing debate about the scope of factors directors should be able to take into consideration in determining what the "best interests" of the corporation are. The traditional approach has been to give extreme deference to the interests of shareholders whose capital is converted to the production of goods and services resulting in almost exclusive focus on short-term shareholder profits. However, there is a growing appreciation that other interests, particularly employees and other stakeholders, make vital contributions to corporate productivity and, therefore, that their interests should figure in to any determination of corporate best interests. Over the past decade, eleven states have enacted legislation to either permit or require the consideration of stakeholder interests in determining corporate best interests decade. It is not surprising that shareholder interests have traditionally been used as the measure for management accountability given the historic role of the corporation as a mechanism for capital formation. However, in a world with highly developed capital markets, unless shareholder interests are defined broadly to include the long-term interests of the corporation as a productive entity and the interests of the stakeholders that make it productive, the corporation may cease to be an effective long-term investment mechanism for shareholders.

Corporate directors must discharge their fiduciary duties in making any decision affecting the operation of the corporation. However, these duties take on particular significance in fundamental decisions that must be made in response to takeovers, leveraged buyouts and other takeover-related activities. With the growing number of state statutes based on the business combination model, which is designed

to encourage a bidder to negotiate with the board rather than to make an unsolicited offer for control by going directly to shareholders, the importance of the fiduciary standard becomes even greater as does answering the question - Accountable to whom?

3. Related provisions

Just as state incorporation laws provide for the creation of corporations, they provide for their merger, acquisition and dissolution. In each of these contexts the rights of shareholders to participate in such fundamental decisions regarding the future of the corporation and to a share of the assets or to reimbursement for the value of their shares are defined. While management can initiate a merger transaction, under most state incorporation laws it could not consummate the transaction without shareholder approval, often by 2/3 or more of the outstanding shares. However, the nature of the transaction that results in a transfer of control determines whether such requirements are triggered. For instance, a purchase of shares through a tender offer could result in a change in control without triggering a shareholder vote. The result is the same (e.g. change of control) but the role of shareholders differs because of the form of the transaction. Many states have acted to correct such inconsistencies through control share acquisition laws, described below.

The stock markets are generally assumed to give shareholders adequate opportunities to realize full value on their shares by selling them. However, where the corporation is dissolved or there is a merger or consolidation which fundamentally transforms the entity in which the shareholder invested, most state laws establish special provisions to protect shareholders from management self-dealing. Most states provide for some type of an "appraisal" mechanism which allows shareholders to obtain an independent evaluation of the worth of their shares and the opportunity to have the corporation buy up their shares at that price under limited circumstances. A number of states have used these provisions as the basis for special statutes which apply only in the context of unsolicited bids.

State incorporation laws also stipulate certain terms and conditions which must be met when control is transferred from one corporation to another. Such provisions deal with the assumption of the liabilities and obligations of a seller corporation such as existing contracts, debts and suits. The exact requirements vary somewhat among the states. However, as a general matter, where there is an explicit contract under state law creating a debtor-creditor relationship, a "buyer" corporation must assume any liabilities and obligations associated with that contract. However, "implicit" contracts, including most employment contracts, need not be assumed. The application of contract assumption provisions found in most state incorporation laws depends to a significant degree on how the transaction was done. For example, the obligations of a "buyer" corporation may be different if he gains control through a purchase of a majority interest of a corporation's stock than if he bought that

corporation's assets. Inconsistent treatment of stakeholders may result. Despite the fact that from the stakeholder point of view different transactions have the same effect, a change in control, differences in the form of the transaction may mean that they have very different rights vis-a-vis the "buyer."

Table 5-1 lists those states with statutes which specifically address the kinds of issues discussed above.

TABLE 5-1: States Adopting Takeover-Related Governance Provisions

	Greenmail Restriction	Compensation Restrictions *	Poison Pill Endorsement	Fiduciary Duties
Arizona	X	X		X
Connecticut				X
Idaho			X	X
Illinois				X
Kentucky			X	X
Louisiana				X
Maine				X
Michigan	X			
Minnesota	X	X		X
New Jersey	X			
Ohio				X
Pennsylvania			X	X
Tennessee	X			X
Wisconsin	X		X	
Total	6	2	4	11

* Compensation restrictions refers to restrictions on golden parachutes and other similar compensation packages which are triggered in the event of a takeover.

Source: Investors Responsibility Research Center, 1988.

State incorporation laws also establish requirements for shareholder participation in certain decisions concerning the adoption of corporate "defenses" to takeovers. Many defenses can be adopted through board action without any shareholder participation. Others require shareholder amendments to the original charter. [See discussion, Section VI below.] There is an ongoing debate over which defenses should require shareholder approval and which should be within the discretion of the board. A second variable in this debate concerns timing, i.e. whether shareholders should have greater or different rights in the adoption of "defenses" after a corporation has received an unsolicited offer or whether requirements for shareholder approval would interfere too much with the directors' capacity to act in the "best interests" of the corporation. Many takeover "defenses" are seen as abuses and excesses which harm shareholders. As a result, Congress has become increasingly interested in regulating, or in some cases, prohibiting the use of certain defenses such as poison pills, golden parachutes and the payment of greenmail. Such regulation raises a variety of significant questions about changing the historic roles of federal and state government in regulating takeover-related activities which effect the relationship of management and shareholders, traditionally an area of exclusive state jurisdiction.

C. Anti-takeover laws

1. First generation

a. Background

Those corporations seeking protection from "hostile" takeovers first turned to the federal government for help. In response, Congress, in 1968, passed the Williams Act, designed to provide investors with sufficient information to enable them to act in their own interest, while maintaining "a level playing field" between targets and bidders. Congress specifically rejected provisions that would have given either targets or bidders an advantage over the other.

Many corporations felt the federal response was inadequate and turned to the states for added protection. By 1982, 37 states had responded by enacting legislation modeled, for the most part, on the Williams Act, but requiring greater disclosure. Some of these "first generation" laws also gave states power to rule on the merits of an offer and then prevent it from progressing. In addition, most "first generation" laws were applied not only to companies incorporated in-state but to foreign corporations as well. The result, see Table 5-2, was 37 laws with varying requirements and overlapping jurisdictions.

In 1982, in Edgar v. MITE, 457 U.S. 624 (1982), the U.S. Supreme Court found the Illinois anti-takeover law (which was closely modeled after the Williams Act) unconstitutional. They held that the Illinois statute both conflicted with the Williams Act by favoring management interests over those of shareholders and provided a substantial impediment to interstate commerce. However, the MITE opinion did not hold that all state regulation of takeovers would be preempted by federal law or violate the commerce clause. Although MITE did little to help states determine what types of regulation might pass constitutional muster, it made quite clear that certain approaches would be unacceptable:

The states could not delay an offer indefinitely or rule on its merits.

There must be a clear link between the state and the companies to which its takeover regulations applied and, if the link was not explicitly stated, there was a clear presumption that a state's regulatory authority was limited to domestic corporations.

State statutes could not discriminate between in-state and out-of-state buyers.

States could only regulate the "internal affairs" of corporations and not their "external affairs" i.e. transactions with third parties.

States could not regulate takeovers in a manner that made compliance with the Williams Act impossible.

In response to the continuing needs of labor, management, shareholders and other corporate stakeholders, the states began developing a "second generation" of takeover laws through a variety of mechanisms including the modification of specific corporate governance provisions affecting "internal affairs," an approach specifically upheld by the Supreme Court in <u>CTS Corporation v. General Dynamics Corporation of America</u>, 107 S.Ct. 1637 (1987).

TABLE 5-2: STATES WITH "FIRST GENERATION" DISCLOSURE LAWS

Alaska	Louisiana	North Carolina
Arkansas	Maine	Ohio
Colorado	Maryland	Oklahoma
Connecticut	Massachusetts	Pennsylvania
Delaware	Michigan	South Carolina
Florida	Minnesota	South Dakota
Georgia	Mississippi	Tennessee
Idaho	Missouri	Texas
Illinois	Nebraska	Utah
Indiana	Nevada	Virginia
Iowa	New Hampshire	Wisconsin
Kansas	New Jersey	
Kentucky	New York	

2. Second generation

a. Background

The principal difference between the two "generations" of takeover laws is that the "first generation" laws directly regulated tender offers through state securities laws, which co-exist with an elaborate federal regulatory regime, while "second generation" statutes regulate takeovers indirectly through state laws concerning corporate organization and governance which, for the most part, have no federal parallel. Four general models have evolved: 1) the control share acquisition model; 2) the business combination model; 3) the fair price model; and 4) the control share, cash-out model. Each of these "second generation" models meets the constitutional standard established in <u>MITE</u> which requires no conflict with the explicit language of the Williams Act. However, there is ongoing debate concerning the extent to which particular models may be inconsistent with Congress' intent in the Williams Act to develop a neutral regulatory framework which created a "level playing field" which did not favor either bidders or targets.

The control share acquisition model is the only state takeover model that has been explicitly upheld by the U.S. Supreme Court, <u>CTS Corporation v. General Dynamics Corporation of America</u>, 107 S.Ct. 1637 (1987). In that opinion, the Supreme Court upheld the Indiana

Control Share Acquisition Act on the grounds that the Indiana statute did not directly conflict with the Williams Act and that by limiting its regulatory authority to the "internal affairs" of domestic corporations, Indiana was exercising the traditional authority of states to regulate corporations and not unduly interfering with interstate commerce. The extent to which the other models address specific takeover abuses rather than creating barriers that protect in-state corporations from all unsolicited offers is viewed as a key

TABLE 5-3: States with Second Generation Statutes

	Control Share Acquisition	Fair Price	Business Combination	Control Share Cash-Out
Arizona	X	X	3 yrs	
Connecticut		X	5 yrs	
Delaware			3 yrs	
Florida	X	X		
Georgia		X	5 yrs	
Hawaii	X			
Idaho	X	X	3 yrs	
Illinois		X		
Indiana	X	X	5 yrs	
Kansas	X			
Kentucky		X	5 yrs	
Louisiana	X	X		
Maine			5 yrs	X
Maryland		X		
Massachusetts	X			
Michigan	X	X		
Minnesota	X		5 yrs	
Mississippi		X		
Missouri	X	X	5 yrs	
Nebraska	X		5 yrs	
Nevada	X			
New Hampshire	X			
New Jersey		X	5 yrs	
New York		X	5 yrs	
North Carolina	X	X		
Ohio	X			
Oklahoma	X			
Oregon	X			
Pennsylvania		X	5 yrs	X
South Carolina	X	X	2 yrs	
Tennessee	X	X	5 yrs	
Utah	X			
Virginia		X	3 yrs	
Washington		X	5 yrs	
Wisconsin		X	3 yrs	
Total	21	22	19	2

Source: Investors Responsibility Research Center, Inc., 1988.

factor in whether they will also be found to meet the guidelines established in MITE. Table 5-3 identifies which states have adopted one or more of the models discussed in the next sections. These models are discussed in the order in which they were adopted by the states.

Each model reflects the deep concerns of the states concerning both the social and economic costs of takeovers. However, each is based on distinct underlying assumptions and is designed to address different concerns raised by takeovers. The different models also reflect the growing sophistication of state legislatures in dealing with the issues raised by takeovers and takeover-related activities. As a result, many states have more than one takeover law.

b. Control Share Acquisition Law

The control share acquisition model is designed to address the inherently coercive nature of a sudden, unsolicited bid on both corporations and their shareholders by effectively "extending" the time frame within which shareholders must respond to a tender offer from the 20 days set by the Williams Act by separating the actual tender of shares from the transfer of voting rights. Based on the assumption that shares without voting rights are of little value to an offeror seeking control, this model requires shareholder approval to transfer the voting rights of tendered shares. In one sense, therefore, shareholders get to vote twice on a proposed takeover, once by tendering their shares and later by deciding if the voting rights should be transferred. As a result, target corporations and their shareholders gain additional time to collect information, to evaluate the offer and develop informed responses. Proponents of this model argue that it provides shareholders with the time they need to make an informed choice thus directly addressing the inherently coercive nature of unsolicited bids where the offeror may have analyzed the target for months while shareholders have only 20 days to respond to an offer. Opponents argue that the control share model is designed as a barrier to takeovers by introducing delays, added costs, uncertainty and a greater opportunity for incumbent management to deploy effective defenses or seek alternate bidders.

The control share model was not developed to prevent all takeovers. It is, however, designed to deter takeovers undertaken solely for short-term, financial profits by providing corporations through their shareholders with the opportunity to block a bid which shareholders determine does not serve their best interests. The model assumes, therefore, that given adequate time and information, a direct shareholder vote to approve/disapprove a proposed control share transaction best reflects not only shareholder interests but the interests of the corporation, its stakeholders and the economy as a whole.

The validity of this assumption and, therefore, the value of this model is the subject of considerable debate. Shareholder approval of a control transaction probably is a good measure of short-term

associated with most offers. However, effectively communicating information about a corporation's long-term growth potential with a diverse and decentralized group of shareholders is very difficult. It seems likely that shareholder approval of the transfer of voting rights is a formality except in the rare case where new information becomes available and can be effectively communicated after the tender has been completed demonstrating that the original offer is grossly inadequate. What seems more likely is that the extended time period established by the control share model provides management with the opportunity to find competing bidders with more compatible business strategies or to deploy effective defenses. The importance of the extended time period in this context should not be underestimated. There is also considerable debate over the long-term effects of control share statutes on capital markets, investment patterns and the long-term productivity/competitiveness of our economy.

The basic Indiana model, which applies only to companies incorporated in Indiana, establishes threshold proportions of voting power at one-fifth, one third and a majority. If an acquiring entity or bidder acquires shares that would cause it to cross one of these thresholds, the bidder does not automatically acquire the voting rights associated with the new shares purchased. The transfer of voting rights must be approved by a majority of the disinterested shareholders, excluding the bidder, inside directors and officers of the target and other management controlled blocks of stock. A bidder who proposes to make or has made an acquisition of shares that would trigger the Indiana Act can request a special shareholders' meeting, which must be held within 50 days of the request, for a shareholder vote on the transfer of the voting rights. The expenses of the special meeting are borne by the bidder. The requirement for shareholder approval of the transfer of voting rights does not apply if the acquisition is part of a board approved merger agreement. Opponents of the control share model see it as increasing costs and uncertainty. Proponents of the model see it as encouraging long-term, productive investment by deterring takeovers undertaken exclusively for short-term, financial profits and as a mechanism to ensure that shareholders have sufficient time to evaluate an unsolicited offer and act in their best interests and, presumably, in the best interests of the corporation.

As a practical matter, any delays or cost increases caused by a control share is likely to benefit shareholders at the expense of the long-term interests of the corporation and its stakeholders rather than serve as an actual barrier to the takeover transaction.

TABLE 5-4: Control Share Acquisition Model (21 states)

Ohio	Missouri	Louisiana
Oregon	Indiana	North Carolina
Florida	Hawaii	Massachusetts
Wisconsin *	Arizona	Nevada
Minnesota	Oklahoma	Idaho
Kansas	Michigan	Nebraska

New Hampshire	Utah	South Carolina
Tennessee		

* repealed 1986

c. Business Combination Law

i. General model

The basic business combination model is fairly simple. If a person acquires a threshold interest of the voting stock of a domestic corporation he becomes an "interested shareholder" and may not engage in any "business combination" with the corporation for a specified number of years. A business combination is broadly defined to include mergers, sales of assets and transfers of stock. By using the potential business combination prohibition and specific exemptions to that prohibition, business combination statutes encourage a bidder to negotiate with the board rather than make an unsolicited offer for control. The model is designed as a negotiating chip, like the "poison pill" (see Section VI(B) below) upon which it is based, rather than as a barrier to takeover transactions. This negotiation process is assumed to provide the best opportunities for the board to get "full value" for the firm.

Business combination laws are also designed to encourage fully-financed cash offers for a substantial majority of, if not all, outstanding shares. The two models are based on very different assumptions. By contrast, the business combination model assumes that the interests of the corporation, its shareholders and stakeholders are best served by its board which serves as the focus for negotiation on behalf of these disparate interests. Despite this apparent inconsistency, at least 17 states have chosen to adopt both control share acquisition and business combination laws to address the coercion inherent in unsolicited offers as well as shareholder and stakeholder abuses associated with financial takeovers that often lead to the sale of target assets and worker/community dislocation.

As mentioned above, the major elements in business combination laws are: 1) the threshold ownership trigger which defines when a purchaser becomes an "interested shareholder"; 2) the length of time the business combination prohibition extends for; 3) the number and kinds of exceptions that enable an "interested shareholder" to avoid the business combination prohibition; 4) the conditions imposed on the buyer in exercising these exceptions. The states enacting business combination have adopted different thresholds, time periods and exceptions in order to accomplish specific objectives. These will be discussed in greater detail in the next two sections. However, variations in these elements raise a number of generic concerns that will provide some context.

Lowering the trigger threshold obviously expands application of the statute by making individuals who purchase smaller blocks of stock "interested shareholders," subject to the requirements of a business

combination law. This should increase the effectiveness of a business combination law prohibiting a larger pool of bidders from engaging in the coercive and abusive conduct the business combination model is designed to address. Lowering the trigger threshold should also have the added benefit of decreasing the opportunity for an individual to purchase sufficient stock in a firm to use it for greenmail purposes. It can be argued that lowering the trigger threshold may raise the cost to a hostile offeror, and, therefore, tip the balance in favor of management. To the extent this is accurate, lowering the trigger threshold could make a business combination statute more vulnerable to constitutional challenge. However, as long as there is a meaningful opportunity for a hostile offeror to consummate an offer, it should withstand scrutiny.

Increasing the length of the business combination prohibition period could raise similar concerns. Time is money. The longer the prohibition period, the longer corporate assets are unavailable to the new owner for financing the takeover. Therefore, the longer the prohibition period the greater the incentive to the "bidder" to structure the transaction so that it is consistent with policy objective of the statute as defined by its exceptions falls within one of either increases the disincentives to a buyer acquiring the firm for financial value of its assets rather than for the purpose of running the business productively. However, a longer prohibition period may also reasonably terms other than those deemed in the public interest, i.e., without triggering a statutory exception. Based on decisions concerning the Delaware law, the more "reasonable" exceptions the law contains, the more likely it is to be upheld. The imposition of specific buyer conditions raises questions concerning equitable treatment of "hostile" v. incumbent management, at least in the Connecticut instance, apparently creating a double standard respecting responsible corporate conduct. Such a double standard could be easily removed through amendment of other state laws. However, absent such amendment, buyer condition provisions in a business combination law appear to reflect the assumption that incumbent management behaves more responsibly than "hostile" management would.

TABLE 5-5: Business Combination Model (19 states)

Indiana	New York	Wisconsin
Kentucky	Arizona	Delaware
Missouri	Virginia	Connecticut
New Jersey	Washington	Georgia
Idaho	Maine	Minnesota
Nebraska	Pennsylvania	South Carolina
Tennessee		

ii. Five-Year Freeze-Out Fair Price Laws

In 1985 New York enacted what has been referred to as a "five-year freeze-out fair price" law which served as the prototype for most of the business combination laws in force today. Like all business

combination laws, the New York law was designed to encourage bidders to negotiate with the board of directors and to deter offers which would require the use of target assets to service the debt incurred in the acquisition. A statement accompanying the bill stated that it "...would encourage a potential acquiror to negotiate the proposed merger with the target company's board and discourage hostile, asset-stripping takeovers....[It would] also eliminate the need for corporations to employ overly aggressive defensive tactics which could adversely affect shareholders' interests." The New York law was designed to accomplish these objectives through a five-year asset freeze and a fair price provision triggered after the freeze expires.

The business combination portion of the New York statute is straightforward. If a person acquires 20% or more of the voting stock of a New York corporation (defined by statute) without prior approval of the board of directors, he becomes an "interested shareholder" and may not engage in any "business combination" for five years. The New York provides only two ways to avoid the business combination prohibition:

> the board of directors may approve a proposed stock purchase or business combination before the bidder crosses the 20% threshold and becomes an "interested shareholder;" or
>
> a majority of the "disinterested shareholders" can amend the corporate by-laws to opt-out of the New York law. Such an amendment will not become effective for 18 months after adoption. Therefore, an "interested shareholder" at the time of the amendment would still be prohibited from engaging in a business combination for another 18 months and any 20% purchase made in that 18 month period would still trigger the five year business combination prohibition.

Expiration of the five-year freeze provision triggers the fair price portion of the New York statute. After five years an "interested shareholder" is free to engage in any business combination if he meets one of two conditions. Either a majority of the disinterested shareholders must approve the transaction or the "interested shareholder" must pay a statutorily determined fair price to all shareholders demanding payment for their shares. A "fair price" is defined as the <u>highest</u> of the following three prices: 1) the highest price paid for shares in the five years preceding announcement of the proposed business combination; 2) the market value of the stock on the day the proposed business combination was announced; or 3) the market value of the stock on the day of the 20% acquisition that made the bidder an "interested shareholder." The New York law further requires that shareholders have the option of "cashing out" with the same method of payment as the "interested shareholder" used to purchase the majority of his shares. More simply, if the "interested shareholder" used cash to buy a majority of shares, minority shareholders are entitled to receive cash for their shares. The "interested shareholder" must also pay interest from the date used to determine the fair price.

The New York law also contains an anti-greenmail provision which prohibits a corporation from purchasing 10% or more of its shares at a price above the market value unless both the board of directors and the shareholders approve such a transaction or the corporation purchases 100% of the outstanding shares. In many ways, the anti-greenmail provision parallels the fair price component of the statute. In essence, if a corporation buys 10% or more of its shares at an above market price, it is treated like an "interested shareholder" who must get prior board approval and shareholder approval or pay fair price to outstanding shareholders. In the greenmail context "fair price" is the same price the greenmailer is getting. This provision clearly protects the short-term interests of shareholders since they will receive the same inflated price a greenmailer would. More practically, it would seem to make payment of greenmail virtually impossible without doing a leveraged buyout at the greenmail rate. The utility of greenmail as a defensive tactic and the role shareholders should play in deciding on defenses continues to be a controversial issue. However, limitation of the use of defenses without adequate protections from the abuses and excesses of takeovers raise serious questions. (see Section VI below)

Although the New York model has been adopted with minor variations by thirteen states there is some question about whether it will meet the constitutional standards established in Edgar v. MITE and CTS Corp. v. Dynamics Corp. of America. For practical purposes, the New York law creates an environment in which an offer for control must either be "friendly" (i.e. approved by the board of directors) or the offeror must have sufficient financing to not only purchase control without using target assets to service debt for five years but then to "cash out" all the minority shareholders at the highest price the offeror paid for his shares plus interest. The New York law does not interfere directly with the tender offer process since it does not prevent a fully-financed hostile offeror from purchasing control and running a corporation. However, it allows management to delay a merger with hostile offeror for five years and may significantly increase the cost of a hostile transaction through its fair price requirements. Some have argued that although the New York law does not directly conflict with the Williams Act since it does not regulate securities trading, it is inconsistent with the Congressional intent behind the Act of maintaining a "level playing field" between bidders and management. Despite challenges, the New York model has not been invalidated by the courts.

Kentucky was the next state to enact a business combination law based on the New York model. Kentucky's statute is quite similar with the exception that the trigger threshold was lowered to 10% compared to New York's 20% trigger. Kentucky already had a "fair price" law which was incorporated into the new business combination law so that it became effective as soon as the five-year freeze period ended. In a significant departure from New York, Kentucky also prohibited an acquiror from selling target assets to service or pay off debt accumulated to finance the takeover.

In 1986 New Jersey adopted a law identical to Kentucky's with a 10% trigger, five-year freeze and fair price provisions. Indiana and Missouri enacted very similar legislation at almost the same time. Indiana used a 10% trigger while Missouri opted for a 20% trigger.

iii. Asset freeze; prior approval and 85% ownership exceptions

Enactment of the Delaware Business Combination Act in 1987 marked the first significant departure from the New York business combination model. Just like the New York model, the Delaware law is designed to encourage bidders to negotiate with the board of directors rather than make unsolicited offers for control and to encourage fully-financed cash offers for a substantial majority, if not all, outstanding shares. Like other business combination statutes, the Delaware law is based on the assumption that the interests of a corporation, its shareholders and stakeholders are best served by a strong board of directors which can effectively negotiate with a bidder. The Delaware law is also specifically designed to protect shareholders from coercive two-tiered offers and to deter the under-financed or over-leveraged offers most closely associated with the post-merger sale of corporate assets, plant closings and employee layoffs. The law is structurally similar to New York's, although with a 15% trigger and a three-year prohibition period. The major difference is that the Delaware law provides seven ways to avoid the business combination prohibition compared to New York's one (e.g. prior board approval). Its supporters view it as a carefully crafted and conservative response to the coercive and abusive aspects of "financial" takeovers, protecting stakeholders and shareholders without significantly deterring transactions which enhance productivity and economic competitiveness. Opponents portray it as an insurmountable barrier to all takeovers, entrenching inefficient management and depriving shareholders of the full value of their investments. It is too early to tell its actual impact. However, the Delaware law is the product of careful deliberation that reflects Delaware's unique role as the incorporator of American firms and the legal concerns raised by the fact that most Delaware corporations are not located in Delaware.

Structurally, the Delaware Act closely resembles New York's. If a person acquires 15% or more of the voting stock of a Delaware corporation without prior board approval, he becomes an "interested stockholder" and may not engage in any "business combination" with the corporation for three years. A business combination is broadly defined to include mergers, sales of assets and transfers of stock.

In contrast to New York's one exception (e.g. prior board approval), the Delaware law provides seven ways to avoid the business combination prohibition.

> The board may approve the stock acquisition or the proposed business combination before the person becomes an "interested stockholder" (e.g. buys 15%).

A person who acquires 85% of the voting stock in the transaction in which he becomes an "interested stockholder" is exempt from the statute. (In calculating the 85%, shares owned by inside directors and ESOPs where employees lack confidential voting rights on those shares.)

A proposed business combination may be approved by the board and 2/3 majority of the voting stock not owned by an "interested stockholder."

If the board approves a control transaction with a third party, any "interested stockholder" is free to propose and consummate a competing business combination within 20 days (the so-called "auction provision").

A person may conduct a proxy contest, replace the board and have the new board approve his stock acquisition or business combination before he becomes an "interested shareholder."

Stockholders may amend the bylaws to opt-out of the Delaware law. Such a by-law amendment will not become effective for 12 months after adoption and is inapplicable to a person who was an "interested stockholder" prior to its adoption.

An "interested stockholder" may acquire control of a company, remove the board and sell corporate assets to third parties or liquidate the corporation provided that any dividends or distributions are shared pro rata with the remaining stockholders.

As discussed above, the concerns addressed by the Delaware Business Combination Law are essentially the same concerns addressed by other business combination laws. However, Delaware has attempted to develop more flexible and more narrowly targeted mechanisms to deal with shareholder coercion and the disruption associated with target asset sales without preventing takeovers which might enhance productivity and efficiency. For instance, the New York model requires an "interested shareholder" to "cash-out" minority shareholders demanding payment for their shares at a fair price. In contrast, Delaware developed a two-pronged approach designed to minimize the number of minority shareholders in any transaction and to ensure that minority shareholders share in the proceeds of asset sales and liquidations. The 85% ownership exemption from the business combination prohibition creates an indirect incentive to bidders to make an offer at a price sufficiently attractive to induce most, if not all, shareholders to tender their shares at the offer price reducing the number of minority shareholders. In addition, the Delaware law requires that an "interested shareholder" share the proceeds of asset sales or liquidations with minority shareholders on a pro rata basis. The 85% exemption reduces the number of shareholders who could be "cashed-out" at a lower price in the second step of a merger and the liquidation provision requires that minority shareholders get their fair share of corporate value.

iv. Hybrid model

Connecticut is one of the most recent states to adopt a business combination model law. Although similar to the New York law in most respects, the Connecticut law provides an interesting example of how a business combination statute could be used to address other concerns raised by takeovers such as the effect board composition has on efficiency; the fiduciary duty of corporate directors; and the provision of "soft landing" benefits to stakeholders dislocated as the result of a change in corporate control.

How it works

If a person acquires 10% or more of the voting stock of a Connecticut corporation without prior board approval, he becomes an "interested shareholder" and may not engage in any "business combination" with the corporation for five years, <u>unless</u>:

(a) the corporation has opted out of coverage before the business combination or purchase of shares was proposed;

(b) a person becomes an interested shareholder inadvertently and divests himself as soon as practicable;

(c) a person becomes an interested shareholder because he owned 10% or more on February 1, 1988; or

(d) the target corporation is a signatory to the Connecticut Partnership Compact <u>and</u> amends its charter or by-laws by a 2/3 shareholder vote to opt out of coverage, effective 18 months following the vote. [At the time of enactment the terms and conditions of the Connecticut Compact had not yet been determined. However, the Compact is intended to establish certain standards of corporate responsibility vis-a-vis stakeholders including notice of plant closings and, possibly, severance benefits.]

Like the New York model, Connecticut provides only one way to avoid the business combination prohibition once triggered. The buyer must obtain board approval of the stock acquisition that would push him over the 10% threshold or of the proposed business combination before he becomes an interested shareholder. This requires the approval of a majority of the board as a whole and of the outside directors as well of which there must be two. In addition to setting the composition of board of directors, the Connecticut law specifically states that the fiduciary duty of directors evaluating an offer permits them to consider the interests of stakeholders and the possibility that the interests of the corporation and its shareholders may be best served by refusing the offer.

To summarize, the Connecticut model appears to be a more stringent version of the New York model with three additional differences:

1. It would establish a minimum number of outside directors for the boards of Connecticut corporations seeking to opt out of its coverage after the business combination prohibition has been triggered.

2. It would require that a corporation seeking to opt out after triggering the statute be a signatory to the Connecticut Partnership Compact and wait 18 months after receiving shareholder approval.

3. It explicitly states that a director may consider the interests of corporate stakeholders and the community in evaluating whether to accept/reject an offer.

General effect

Like all business combination statutes, the Connecticut law would presumably encourage bidders to negotiate directly with the board rather than to attempt acquiring control through stock purchases. Since prior approval is the only way to avoid triggering the business combination prohibition, this model would appear to be a strong incentive to negotiating with the board. It is less clear that the Connecticut model provides as strong an incentive as Delaware for making a fully financed offer since even if an interested shareholder had 100% control, replaced the board and had it sign the Compact and opt out, it would still have to wait 18 months before engaging in a business combination. The overall effect of the "Compact/opt out" provision would appear to be that of providing at least 18 months notice prior to consummation of a business combination following an unsolicited bid or stock purchase triggering the 10% threshold.

What the Connecticut law does not do, but easily could have done, is to make application of the business combination prohibition conditional on either the "interested shareholder" or the target corporation becoming a signatory of the Compact. This would be a mechanism similar to that proposed by Professor Reich, depending on the Compact's terms and conditions. The most important variable in this context would be who should be the signatory? Requiring the "raider" to be a signatory could raise the transaction cost and either deter marginal buyers or create incentives for target asset sell-offs once the transaction is completed. Encouraging the Connecticut firm to be the signatory would probably have the most direct effect in the short-term on worker and community dislocation (again, depending on the terms the Compact). While this might provide the greatest protection, requiring firms to sign the Compact, if it is to have meaning, would almost certainly require them to divert funds into "reserve accounts" of some type to pay severance benefits. This could slow growth dependent on investment in R & D, equipment, marketing and training. There is considerable debate whether this type of response promotes or hinders long-term economic growth. The argument in support is generally that it increases the stake in making an operation competitive in the long-run since it greatly increases the costs of going out of business. The opposing argument is that it introduces rigidities and barriers to change just at a time of economic transition that requires maximum flexibility. An additional

concern raised by this model is that it creates a mechanism which holds "raider" management to a different standard of conduct than that required by incumbent Connecticut management teams who are not required to sign or live up to the requirements of the Connecticut Compact.

d. Fair Price Law

Laws based on the fair price model require an acquiror to pay all corporation shareholders a fair price for their shares unless a supermajority of the shares (votes) approves a business combination on other terms. Designed to protect shareholders from coercive, two-tiered tender offers, fair price laws have the same general effect of the fair price supermajority charter provisions adopted by many corporations over the last decade. It does not directly regulate tender offers. However, by requiring supermajority shareholder ratification, fair price laws are aimed at eliminating two-tiered bids, whether tender offers, open market purchases or privately negotiated transactions, in which a bidder pays a relatively high price for control (51% of shares) and purchases the remaining shares for a lower price. Although fair price laws would deter takeovers by bidders unwilling or unable to pay all shareholders a fair price, such laws are not designed to, nor would they be effective in, preventing all takeovers. They are specifically targeted at the shareholder coercion inherent in two-tiered takeovers. In this respect, the fair price model resembles the business combination model in than neither prevents a buyer from entering into the transaction which triggers the statute. However, once an offeror gains a threshold interest in the target triggering the statute, each carefully limits the options available to the bidder thereafter.

Maryland enacted the first fair price statute in 1983. It establishes clear standards and definitions for "fair price" and for the approval of transactions which do not meet these criteria. Briefly it operates as follows. If a person acquires 10% of the voting stock of a Maryland corporation he becomes an "interested shareholder" and must pay all shareholders a "fair price" in the event of a "business combination," broadly defined. "Fair price" is defined by statute as the highest of the following amounts: 1) the highest price paid for the company shares in the two years before announcement of the proposed business combination or in the transaction in which the acquiror crossed the 10% threshold; 2) the market value per share on the date the proposal was announced or the date 10% was acquired; or 3) the value determined in 2) multiplied by the highest price paid in the previous two years divided by the market value of the common stock on the first date the shares were acquired in the two-year period. The Maryland law provides two ways to avoid the "fair price" requirement:

> the board of directors can approve the proposed business combination before the acquiror crosses the 10% threshold and becomes an "interested shareholder;" or

the board of directors can recommend a proposed transaction by an "interested shareholder" to the shareholders for supermajority approval, defined as approval by 80% of the outstanding shares (including those owned by the bidder) and approval by 2/3 of the shares not held by the bidder.

The Maryland statute also provides a number of protections to prevent an "interested shareholder" from engaging in "self-dealing" transactions between the time he crosses the 10% threshold and completes the business combination. Dividend must continue to be paid; the "interested shareholder" is prevented from acquiring more shares except through stock splits and dividends; and the "interested shareholder" may not take advantage of any loans, tax credits or other benefits provided by the company.

Before the <u>CTS</u> decision upholding the control share acquisition model, the Maryland was the most popular. Twenty two states followed Maryland by enacting "fair price" laws. The majority of these laws are virtually identical to Maryland's. However, several (e.g. Mississippi, Virginia, Georgia) provide an additional way to avoid the "fair price" requirement: approval of a proposed "business combination" by the board of directors <u>after</u> the bidder has become an "interested shareholder." The trigger threshold which determines when an acquiror becomes an "interested shareholder" varies somewhat from state to state as do the specific supermajority voting levels.

TABLE 5-6: Fair Price Model (22 states)

Connecticut	Georgia	Illinois
Kentucky	Louisiana	Maryland
Michigan	Mississippi	Virginia
Washington	Wisconsin	Florida
Pennsylvania	North Carolina	Arizona
Idaho	Indiana	Missouri
New York	New Jersey	South Carolina
Tennessee		

e. Control Share Cash-Out Law

Control share cash-out laws are a variation on the control share acquisition model discussed above. The models are similar in that they are both triggered by a "control share acquisition." However, they differ significantly in terms of the abuses they are intended to address and the overall effect they have on the takeover process. Control share acquisition laws address the inherently coercive nature of unsolicited offers by providing shareholders with added time to gather information and evaluate the offer. Control share cash-out laws address the shareholder coercion associated with two-tiered offers by requiring that a person buying a "control share" must buy out, at a statutorily determined "fair price," any shareholder demanding payment for his shares. Neither model purports to prevent takeovers or the transfer of significant blocks of shares. However, the risks faced by a bidder differ substantially for the two models. Under the control

share acquisition model, a bidder determines how large an interest he wishes to take in a target and what the transaction will cost. He assumes the risk that the shareholders may not transfer the voting rights for the shares he purchases. However, even without voting rights, the shares he purchases have value. By contrast, a person triggering a control share cash-out law cannot control the cost of the transaction. The total cost will depend on the demands of the minority shareholders. Therefore, unless a bidder is willing and able to purchase up to 100% of the shares of a target, he cannot trigger a cash-out provision without assuming substantial risks. Control share cash-out laws have been criticized as clearly designed to protect corporations from hostile bids on this basis. The "chilling effect" statutes of this type may have on bidders is thought by some to make it less likely to withstand constitutional challenge. For this reason, perhaps, it has not been a particularly popular model.

Pennsylvania enacted the first control share cash-out law in 1983. Under the Pennsylvania statute, if a person buys 30% or more of the outstanding stock of a Pennsylvania corporation, he becomes a "control shareholder" and must notify all other shareholders of the acquisition and of their right to demand payment for their shares. The price is established by statute as the highest price paid by the "control shareholder" in the transaction in which he crossed the 30% threshold. There is no time limit within which minority shareholders may demand payment for their shares. In addition to the cash-out provision, the Pennsylvania statute provides that any shareholder owning 10% or more of a corporation's shares is an "interested shareholder" prohibited from voting on transactions which directly concern him, essentially preventing an "interested shareholder" from voting on any transaction, such as a merger, between itself and the corporation.

The Pennsylvania law was highly controversial when enacted. It was viewed by some as a political response to protect Pennsylvania corporations from hostile bids following a series of successful takeovers by out-of-state corporations. Although the bill had strong support within the business community, several large firms opted out of its coverage through by-law amendments in order to maximize their flexibility if they were confronted with a hostile bid and because they doubted the statute's constitutionality.

It took two years before another state - Maine - adopted a control share cash-out law. Maine's law is triggered by a 25% ownership threshold rather than Pennsylvania's 30% trigger. Maine also requires the "control shareholder" to provide notice to minority shareholders within 15 days of the control share acquisition; to make an offer on the shares within 10 days; and sets a 30 day limit for minority shareholders to respond and negotiate a price for their shares.

TABLE 5-7: Control Share Cash-Out Model (2 states)

Pennsylvania (1983)	Maine (1986)

D. "Soft-landing" mechanisms

The states deal with the day to day realities associated with the disruptions and dislocations of economic transition, including takeovers, on a level quite distinct from that of the federal government. As discussed in Section IV above, the states have primary responsibility for implementing federal programs which require the delivery of services or benefits to individuals such as unemployment insurance, job training and skills upgrading, welfare and medicaid. While the federal government has played a substantial role in creating and to varying degrees funding such initiatives as the Job Training Partnership Act, Aid to Families with Dependent Children (AFDC) and Medicaid, it is the states who ensure such programs operate effectively to assist affected individuals. Many states have found that the federal "safety net" is not sufficient to meet the needs of their citizens and have adopted two distinct but interrelated approaches to augment federal programs. Many states provide supplemental benefits and/or services tailored to respond to local and regional economic and labor market characteristics. Of particular relevance in the takeover context, many states have established employment and training programs that fill gaps in federal programs or that are designed to build on those programs and to minimize the effects of workforce dislocation and disruption. By expanding opportunities for dislocated workers to re-enter the workforce as soon as possible following dislocation or by creating new opportunities for individuals outside the workforce to enter it for the first time, these programs address the same concerns as the federal programs, efficient operation of labor markets, but do so on a much more targetted basis.

The second approach adopted by most states is one of emphasizing the importance of long-term growth and economic diversification to ensure sustained job creation and expanding opportunities. These programs vary substantially in nature from "smokestack chasing" recruitment strategies to strategies to encourage emerging technology-based industries to develop from local universities. They also vary in effectiveness. However, they all share the goal of expanding the number of jobs available to members of the workforce to minimize the effects and consequences of dislocation whether takeover-related or caused by technological change or increased competition. Promoting long-term economic growth and job creation increases the options available to a flexible and adaptable workforce and to their long-term security as productive members of the workforce.

VI. CORPORATE RESPONSE(S)

A. Perspectives

In these times of rapid and often turbulent change, there are many pressing issues of importance to corporate America. American businesses are facing unprecedented competition from abroad, often by companies which are aided significantly by the policies of their national governments. Accelerating technological change is creating long-term commercial opportunities. Yet, their speed also increases the risk that any business strategy adopted or new product introduced may be obsolete before it can be fully implemented. Volatile financial markets, a federal deficit that is a magnet for foreign investment and the increasing number and dollar value of successful takeovers and takeover threats have necessarily -- but sadly -- led many managers of corporate America to adopt short-term strategies at the expense of long-term investments in people, plant and innovation - investments critical to our competitiveness and to sustained economic growth.

The role of the corporation itself is also changing. In its most limited sense, the corporation could be viewed as a mechanism for pooling investments for the profit of shareholders. However, the value of the corporate structure for this purpose depends on how effectively and efficiently it can be utilized to invest capital for the production of goods and services. This requires a view of the corporation as a complex social and political organization designed to deploy the various resources it can produce or purchase as efficiently as possible to provide a return not only to its shareholders but to all stakeholders whose investments contribute to corporate productivity. In order to further increase productivity, the corporation is expanding beyond its traditional role as an economic enterprise. Increasingly, corporations provide what were once considered to be solely "social" or "public" services, whether health insurance, education or income security through pension plans, profit-sharing or other devices. This trend is likely to continue as privatization of public services continues. Furthermore, apart from new publicly-oriented business purposes and products, corporations are becoming more engaged with government in novel public-private partnerships in areas as diverse as employee training, literacy, child care and housing. In Massachusetts, these changes are an integral component of the relationship between business and government which led to the economic revitalization we have experienced over the last 15 years.

This panoply of changes, however, is often accompanied by difficult adjustments in the relationships among corporations, their workers, the communities in which they operate and the states in which they reside. These changes also compel public officials to re-examine the legal framework within which corporations function and their expectations of corporate responsibilities. In many instances, and certainly more so in the climate of corporate takeovers, this re-examination is requested by corporations themselves.

B. Corporate defenses

In response to the increasing number and size of hostile takeovers, U.S. corporations of all sizes have adopted a wide variety of anti-takeover measures designed to make a hostile takeover more difficult to consummate or to make them less attractive as targets. Generically referred to as "shark repellants," these measures include charter and by-law amendments, which require shareholder approval, as well as certain other measures, such as the "poison pill," which may be adopted at the discretion of the board of directors without a shareholder vote. As with takeovers, corporate anti-takeover measures are the focus of considerable controversy and, in many cases, for similar reasons. While takeovers raise questions about the implications of control changes for shareholders, stakeholders, capital markets and the economy as a whole, anti-takeover measures raise questions about the implications of retaining control and the potential for directors breaching their fiduciary duties to shareholders and stakeholders. Just as "raiders" can abuse the takeover mechanism, corporations can abuse anti-takeover defenses. Anti-takeover measures are often discussed almost exclusively in terms of the evils protecting "entrenched management." However, it is worth noting that many of the most common anti-takeover measures were developed to promote management accountability and stability before there were hostile takeovers . While some of these measures have proved useful in defending against hostile takeovers, their original authorization was not necessarily for that purpose. What follows is a brief description of some of the most common anti-takeover defenses.

Blank check preferred stock
Bylaw amendment
Classified board
Common stock redemption rights
Dual class capitalization and unequal voting plans
Fair price requirements
Greenmail
Lock-in provisions
Non-financial effects of merger
Pension parachutes
Poison pills
Reincorporation
Removal of directors
Severance agreements
Size of the board
Special meetings
Supermajority requirements
Vacancies on the board
Written consent
Golden parachutes
ESOPs
Dual class recapitalization
Restructuring
Going private
White knight

C. Strategic defenses

Corporations have been adopting defensive measures such as those described briefly above with increasing frequency. However, while such takeover defenses may be useful to strengthen the board in the process of negotiating with an unsolicited bidder, they are often not sufficient to prevent consummation of a hostile offer. Increasingly, corporations are adopting strategies designed to prevent an unsolicited offer from being made by making the firm unattractive to a bidder. Although such strategies may be effective, there is growing concern that the preventive strategies adopted by many corporations have essentially the same effect as a hostile takeover would have had on long-term growth and competitiveness. For example, one attribute that makes a firm an attractive target is the availability of cash. Therefore, one strategy to avoid becoming a target is to generate large amounts of debt which a "raider" would then have to add to any debt incurred in a takeover attempt through leveraged buyouts, capital restructurings or acquisitions of other firms. While this may be an effective deterrent, it generates essentially the same short-term pressures and focus faced by the raider after completing a highly leveraged takeover. As a result, many corporations are forced to adopt short-term "cash cow" strategies designed to ensure the cash flow needed to pay the interest on this self-imposed debt, diverting resources from long-term projects with potentially much greater returns. It is easy in one sense to argue that this represents irresponsible behavior on the part of management. However, in a business climate where the inherent risks of making long-term investments are amplified by the increased likelihood that such investments will result in loss of control over the corporation, there is very little incentive to think beyond next quarter's bottom line.

VII. MASSACHUSETTS REGULATORY ENVIRONMENT

A. Perspectives

Massachusetts shares the perspectives of all other states in terms of the concerns and areas on which it focuses. However, given our experiences over the last 15-20 years we have very compelling evidence to support the need for long-term investment to maintain sustained economic growth. The performance of the Massachusetts economy in the 1970s and 1980s provides us with many valuable lessons. However, perhaps the most important is that continuous investment and reinvestment in people, innovation and production capacity is essential to sustained economic growth. The economic well-being of the citizens of the Commonwealth requires not only maximizing the efficient use of existing resources but aggressive investment in the future so that new resources are continually being created.

For example, in 1975 Massachusetts was, in the opinion of many, a state without a future, "the new Appalachia." For 20 years, the industries that had made the Commonwealth one of the leaders in the Industrial Revolution, shoes, textiles and specialized industrial machinery, had been declining, in many cases no longer able to compete successfully. The High Tech Revolution that spawned the large firms of Route 128 had not yet progressed far enough to compensate for the jobs lost in declining sectors. Our unemployment rate was 11.2%, almost 3% above the national average. It is difficult to predict what would have happened to the Massachusetts economy if the investments in emerging, technology-based industries that now employ over 12% of our workforce had not been made. Those investments resulted in the creation of whole industries and nearly 100,000 new jobs that eventually more than replaced the jobs lost in the declining mill-based economy. The diversification of our economic base that followed and the unprecedented prosperity it generated led to the revitalization of the Massachusetts economy and the region's economy.

To ensure access to the resources essential to sustained economic growth, Massachusetts has aggressively pursued an economic development strategy that calls for continuous investment and reinvestment in public infrastructure, in capital formation for industrial and commercial growth and in education and training for people. These were investments in the future to ensure the availability of critical resources needed to respond to change. Using federal programs as a framework, the Commonwealth established a series of programs to enhance their effectiveness and to meet the specific needs of our citizens. Massachusetts has placed special emphasis on facilitating and expediting change to create a future with greater opportunity based on the ideas, investments and innovations of today. This emphasis on the need for investment to assure a future worth having makes the short-term pressures generated by takeovers particularly troubling.

The experiences of the 1970s and 1980s also demonstrate the importance of maintaining the cooperation among labor, business, academia and government that has been central to the development and

implementation of the various programs that guided our economic recovery. Increasingly, corporations have played a key role in delivery of specific services, employment and training, skills upgrading, adult literacy, Employment and Training Choices or general benefits such as health care. The changing role of corporations in this context makes the fear of takeovers even greater.

Massachusetts has a variety of specialized programs of particular relevance to the disruptions and dislocations associated with takeovers. Time constraints make it impossible to adequately discuss these programs and their relationship to the complicated issues raised by takeovers and takeover-related activities. A more thorough discussion will be included in the Final Report.

C. Anti-takeover laws

1. First generation - M.G.L. c. 110C

a. Description/status

Massachusetts first specifically addressed the issues raised by takeovers and takeover-related activities in 1976 with the enactment of legislation concerning the regulation of takeover bids in the acquisition of corporations, M.G.L. c. 110C. Like most "first generation" statutes, M.G.L. c. 110C is based on the Williams Act model but requires greater disclosure. Chapter 110C requires an entity or individual acquiring or making an offer to acquire a corporation doing business in Massachusetts to notify the Secretary of State and the target company on the date of commencement of the bid and to publicly announce the terms of the proposed takeover. Chapter 110C also requires that if an entity/person purchases enough of a firm's outstanding shares to cross a 5% ownership threshold, unless he publicly announces his intention of making a takeover bid, he will be prohibited from doing so for one year, M.G.L. c. 110C, § 3. Designed to prevent "creeping" tender offers and ensure early disclosure, Section 3 (the so-called "penalty box" provision) created an indirect, but relatively effective incentive for large purchasers to notify the corporation and Secretary of State in order to preserve future options. Chapter 110C also authorizes the Secretary of State to conduct hearings on the effect of the purchase at the request of the target or independently. Unlike many states' "first generation" laws, Chapter 110C did not give the Secretary of State authority to rule on the "merits" of a bid and then prevent it from proceeding. Further, its consistency with the Williams Act trigger (5% ownership) level, limits the burden it places on potential bidders despite its more extensive disclosure requirements. As a result, M.G.L. c. 110C has never been found, in its entirety, to be unconstitutional on either Supremacy or Commerce Clause grounds.

There are, however, several problems concerning Chapter 110C:

1. The "penalty box" provision, M.G.L. c. 110C, § 3, was held unconstitutional by the 1st Circuit in the Hyde Park decision (1988) based on the Supremacy and Commerce Clause arguments developed in Edgar v. MITE Corp., 457 U.S. 624 (1982). The Hyde Park decision focused narrowly on Section 3, holding the one year prohibition contained in the penalty box provision conflicted with the Williams Act by giving targets a substantial advantage over bidders and violated the Commerce Clause by interfering with the "commerce" in corporate control. There is concern that these arguments could be, although they have not been so far, extended to the Act as a whole.

2. The Secretary of State's Office faces substantial problems in obtaining/enforcing subpoenas to obtain information from out-of-state purchasers.

3. The expense and difficulty associated with collecting relevant information, analyzing it and conducting hearings is high given 110C's uncertain constitutional status, leading the Secretary of State to implement the statute only at the request of a target company.

Several options for possible action have been suggested:

1. Amend 110C to limit its application to domestic corporations or to establish a stronger nexus as was done in 110E to avoid challenge on Commerce Clause grounds.
2. Re-write the disclosure provisions to require that additional information required by the Secretary of State's Office go to investors to undercut arguments that 110C's primary purpose is to delay rather than protect investors.
3. Amend the "penalty box" provision to substitute substantial monetary fines for the current prohibition on further purchases.
4. Modify the enforcement provisions to give the Securities Division of the Secretary of State's Office the power to levy fines for non-compliance with hearing procedures, including the failure to obey a subpoena issued in a proceeding. This might effectively address the out-of-state subpoena problem, at least as it relates to the production of documents. Personal appearances of parties would still present a problem given the short time frame required by the Act.
5. Time frames could be modified to match those of the Williams Act.

2. Second generation control share acquisition - M.G.L. c. 110D & E

a. Description/status

On July 21, 1987 Governor Dukakis signed the Massachusetts Control Share Acquisition Act, M.G.L. c. 110D & 110E, into law. This Act, which in most ways closely resembles the Indiana statute discussed in Section V above, was designed to extend the time period for corporations and their shareholders to respond to an unsolicited offer for control by separating the actual transfer of shares from the transfer of the voting rights associated with the shares. By extending

the response period, the Massachusetts law was designed to address the inherently coercive nature of sudden, unsolicited offers by enabling corporations and their shareholders to collect the information needed to evaluate an offer and develop informed responses. It was not designed to prevent all takeovers from proceeding. However, it was designed to allow corporations and their shareholders the time needed to determine whether a transfer in control best served their interests.

Although very similar to the Indiana statute discussed in Section V, the Massachusetts Control Share Acquisition Act differs in two significant respects. First, it extends the Indiana-type coverage provided to firms incorporated in Massachusetts (M.G.L. c. 110D) to Massachusetts-based firms incorporated in other states (M.G.L. c. 110E). Second, it requires the Governor, with the advice of the Secretaries of Economic Affairs and of Labor, to report to the General Court in July 1989 on the long-term effects of the law on the Massachusetts economy and to make appropriate recommendations based on their findings. The Commission to Review Massachusetts Anti-Takeover Laws was established to provide the expert advise needed to comply with this provision in light of the rapidly changing economic, legal and financial environment within which takeovers occur. This second distinction reflected a legitimate concern by the Legislature and the Administration that a control share law, by itself, might not be adequate to meet the needs of all parties affected by takeovers and takeover-related activities. However, since their had been no effective action at the federal level to regulate the abuses and excesses of hostile takeovers, it was the judgment of the General Court and the Administration that state regulation, at least in the short-term, was necessary to protect the long-term interests and investments of labor, business, shareholders, consumers, suppliers, communities and the state itself in sustained economic growth.

b. Utility

The Commission has discussed the effectiveness and/or value of the Massachusetts Control Share Acquisition Act on an number of occasions and feels that despite concerns that Chapters 110D and 110E could be used by an under-financed raider to put a firm in play, on balance, our control share acquisition laws are valuable in providing the board of directors the time needed to evaluate an offer and respond effectively on behalf of the corporation, its shareholders and other stakeholders. It also provides shareholders with added time to evaluate a tender offer to weigh the immediate benefits almost always associated with accepting a tender offer with the potential long-term returns that may accrue if the firm remains independent. There was also a general sense that although Chapters 110D & 110E would never serve as a substantial barrier to a serious takeover, it might raise the offer price in some deals. The principal concern raised has been the use of 110D by an under-financed bidder to put a company in play to use the special shareholder meeting requirement as a mechanism to get control. The result has been that many large Massachusetts firms have opted out of 110D coverage understanding that they may opt back

in at any time. The general consensus was that as long as the opt-out and opt-in provisions remained in their current form, this did not represent a significant defect in the statute.

The Commission evaluated M.G.L. c. 110E, the Massachusetts Control Share Acquisition Act as applied to foreign corporations, in light of two post-enactment events:

1) A virtually identical Oklahoma statute was held to be an unconstitutional burden on interstate commerce in TLX Acquisition Corp. v. Telex Corp., (W.D. Okla., Nov. 3, 1987); and

2) SEC promulgation of its new "Shareholder Disenfranchisement" rule (Rule 19c-4).

The Commission's general conclusion was that M.G.L. c. 110E might be unconstitutional, although that determination would have to made by the courts. Further, even if 110E survived constitutional challenge it might be of questionable use since SEC Rule 19c-4 would prohibit a public corporation invoking 110E from listing or trading its stocks on a public exchange. There are, however, questions as to the constitutionality of Rule 19c-4.

In short, the Commission found that M.G.L. c. 110D operated effectively to extend the time period within which corporations and their shareholders must respond to an unsolicited offer, thus addressing one of the most coercive aspects of tender offers which may require a response in a relatively short time period with only limited information. However, there are other abuses associated with takeovers such as two-tiered tender offers and over-leveraged transactions that often lead to bust-ups, of concern to the Commission that the control share model is not designed to address. Therefore the Commission concluded that although the Massachusetts Control Share Acquisition Act was effective in doing what it was designed to do it was not by itself sufficient to ensure the Commonwealth's economic well-being.

VIII. COMMISSION CONCLUSIONS

The Commission met thirteen times over the course of nine months to hear presentations and testimony from the labor, business, banking, and investment communities, lawyers, economists, other academicians and takeover practitioners concerning the appropriate state role in the regulation of takeovers and takeover-related activities. (See Volume II) In its subsequent meetings to evaluate the various options for state and federal action, the Commission relied on the following fundamental findings:

> If Congress were to develop a comprehensive and timely response which effectively balances takeovers' social and economic costs with their potential benefits, action at the federal level with full pre-emption of state regulatory authority in this area would be preferable. Absent a comprehensive federal response, however, the states must retain their traditional authority to regulate corporate activities to protect local economic interests. In this capacity, they can also serve as valuable laboratories to test alternative regulatory approaches.
>
> A comprehensive federal response is not likely in the near future. Therefore, state action is warranted to protect the economic well-being of the Commonwealth and its citizens. In so doing, careful consideration must be given to the overall effect of different approaches on business climate and competitiveness so that we ensure sustained job creation and economic growth.
>
> Massachusetts should not, even if it could, seek to prevent all takeovers since they are an important component of the ongoing process of creating and sustaining a dynamic and competitive economy.
>
> Takeovers and takeover-related activities raise a broad variety of concerns which fall into three basic categories: a) short-term social and economic disruptions to employees, communities, consumers, suppliers and creditors; b) deterrents to long-term investment in research and development, product, market and human resource development, and, plant and equipment which raise serious concerns over the long-term social and economic impacts of this activity on the economy; and c) pressures to adopt short-term corporate strategies generated from increased levels of corporate debt resulting from debt-financed takeovers and takeover defenses.
>
> Takeovers undertaken exclusively for short-term, financial profits raise all the above concerns with little evidence that long-term takeover-related productivity gains outweigh the social and economic costs to the target corporation, its shareholders and its stakeholders.

"Speculative" transactions constitute abuses of the takeover mechanism and, therefore, to the extent they can be distinguished from "productive" takeovers, should be discouraged in order to protect the economic well-being of the citizens of the Commonwealth by promoting the long-term interests of corporations doing business in Massachusetts and the interests of their shareholders and stakeholders.

Takeover-related dislocations/disruptions, whether following "productive" takeovers which enhance productivity and economic performance or "speculative" takeovers which may do neither, represent a subset of the dislocations/disruptions experienced by corporations, their shareholders and their stakeholders in a competitive and dynamic economy. Therefore, policies to facilitate/expedite stakeholder transition are essential components of a comprehensive response to takeover-related activities. To be equitable, such responses should not differentiate between acquirors and incumbent management unless unique takeover-related circumstances require such a distinction in treatment.

The Massachusetts Control Share Acquisition Act (M.G.L. c. 110D & 110E) has, consistent with the Legislature's intent, been valuable in providing target directors and shareholders with the time needed to evaluate unsolicited offers and respond effectively. However, the Act does not adequately address a number of the more coercive and abusive aspects of "speculative" takeovers - those which are most closely linked to stakeholder dislocation/disruption.

M.G.L. c. 110E may represent an unconstitutional burden on interstate commerce. More important, it may serve almost exclusively as a tool for litigation raising the costs and uncertainties associated with takeovers. Even if held constitutional, Chapter 110E may be of little value given the Securities and Exchange Commission's new rule on "Shareholder Disenfranchisement", Rule 19c-4.

With these fundamental assumptions in mind, the Commission proceeded to develop recommendations which balance the long-term economic needs of the Commonwealth and its citizens with the immediate interests and needs of corporations and their stakeholders and shareholders in response to the serious and complex issues raised by takeovers and takeover-related activities. The Commission anticipates including detailed justifications of these findings in the Final Report.

IX. COMMISSION RECOMMENDATIONS

A. Introduction

In developing its recommendations, the Commission carefully evaluated the competing interests of the labor, business, banking and investment communities in the context of rapidly changing legal, economic and financial environments. Its recommendations fall into three main categories: 1) deterring "financial" takeovers whose social and economic costs outweigh their potential long-term benefits to shareholders, other corporate stakeholders and the economy; 2) regulating individual takeover transactions to limit potential abuses and excesses; and 3) responding to the disruptive effects and consequences to stakeholders inherent in takeovers. Each recommendation addresses specific concerns raised by the various interests represented on the Commission and can be evaluated in this context. It is the Commission's belief that the following set of recommendations serves the interests of each of these groups and in the process promotes the Commonwealth's long-term economic well-being.

The Commission makes the following recommendations:

File legislation for a business combination law to supplement our current control share acquisition laws (M.G.L. c. 110D & 110E) to deter two-step mergers and under-financed or over-leveraged takeovers which often prevent a segment of shareholders from realizing the full value of their investment and which are most likely to lead to the sale of target assets and, therefore, in the dislocation of employees, communities and other stakeholders.

Support efforts to amend the National Labor Relations Act to require assumption of collective bargaining contracts following transfers of control and pending action at the federal level adopt state legislation similar to that enacted in Delaware to require assumption of collective bargaining agreements that cover workers employed in Massachusetts.

Establish one or more mechanisms to charge back to employers the costs to the state of worker dislocations, including takeover-related dislocations of stakeholders, such as Re-employment Assistance Benefits, extended health care coverage, job counseling, referral, placement and training services as well as support services such as child care and transportation.

Support legislation filed by the Administration and the Senate and House Chairs of the Joint Committee on Commerce and Labor without amendment to clarify the fiduciary duties of corporate directors permitting them to consider the interests of stakeholders and the local and state economies in determining what is in the best interests of the corporation and its shareholders.

Amend M.G.L. c. 110C §3 to replace the transaction prohibition recently voided by the federal courts with monetary and/or criminal penalties and to limit its application to domestic corporations.

Support legislation currently before the Massachusetts House of Representatives to make certain technical amendments to the Massachusetts Control Share Acquisition Act, M.G.L. c. 110D & E.

Monitor court decisions and the federal regulatory environment to determine effectiveness of M.G.L. c. 110E.

Affirm the state's role in takeover regulation to ensure that it retains its traditional authority to protect the welfare of citizens and local economic interests.

Support continued efforts by Congress to develop a comprehensive and effective response to the issues raised by takeovers and related activities, particularly tender offer reform.

Increase Securities and Exchange Commission (SEC) enforcement of current insider trading laws.

Support the states' efforts to enact legislation to obtain access to Hart-Scott-Rodino premerger filings. Support amending the Clayton Act to lengthen time periods for federal review of mergers and takeovers and urge Congress to examine whether the Department of Justice Merger Guidelines give undue weight to potential efficiencies in otherwise anticompetitive mergers.

The Commission considered in depth several proposals which are not among its recommendations in this Interim Report. In some cases, due to the complexity of their policy and legal implications, the Commission members were unable to reach a clear consensus and have made a commitment to continue consideration of these proposals for the Final Report. These items are discussed in greater detail in Section X below. In other cases, after careful consideration the Commission specifically rejected certain proposals or components of proposals as inconsistent with the general conclusions they had reached about the effect of takeovers and the appropriate role of the state in their regulation. All proposals considered by the Commission are included among the Working Papers in Volume II of this report.

B. Business Combination Law

After careful deliberation, the Commission developed a strong consensus that although the vast majority of takeovers contributed to the productivity and competitiveness of the economy, takeovers undertaken primarily for financial profit did not, on balance, add to our economic well-being and posed significant threats to shareholders, stakeholders and our future competitiveness. These "non-productive" transactions generally fall into one of three categories: 1) partial

tenders or two-step mergers which force shareholders to choose between tendering their shares or being on the back end of a deal and receiving less than full value for their shares; 2) over-leveraged or under-financed takeovers which force new management to use target assets to pay down the debt assumed to finance the deal; and 3) purchases of significant blocks of stock to be used exclusively for greenmail or other similar purposes with no intent of assuming control. A transaction falling within any of the above categories can generate tremendous short-term, paper profits for the bidder, his attorneys, investment bankers and the investors financing the deal. However, such transactions clearly abuse and coerce incumbent managers, and corporate shareholders and stakeholders with little, if any, evidence that such transactions contribute to the economic well-being of the Commonwealth or the nation. These short-term profits often represent a liquidation of the future value of the corporation, and future income to its shareholders and stakeholders gained through employee layoffs, asset sales, adoption of short-term, "cash-cow" strategies and the creation of tremendous levels of corporate debt which de-stabilize not only the target firm itself but the "buyer" and potentially the entire economy in the event of a recession. It has been argued that such takeovers promote competitiveness by forcing inefficient firms to down-size and develop "lean-and-mean" management strategies that improve productivity and competitiveness. In some cases this may be true. However, the literature indicates and the Commission concluded that the overall effect of takeovers that fall within the three categories listed above is negative. It further concluded that the Massachusetts Control Share Acquisition Act was not designed to specifically address such abuses and excesses and for that reason did not effectively protect the Commonwealth. Finally, it was the sense of the Commission that the board of directors was in the best position to effectively represent the varied interests of the corporation, its shareholders and stakeholders in responding to an offer for control. Therefore, the Commission recommends adoption of a business combination statute specifically designed to address these concerns as a supplement to existing laws designed to regulate takeovers.

The Commission carefully examined alternate proposals for a statute based on the business combination model including the New York five-year asset freeze model, the more flexible and focused Delaware model and the recently enacted Connecticut statute. [see discussion Section V.C.2.c above] Based on both policy and legal considerations, the Commission decided that the Delaware model, with a lower trigger threshold, would best meet the economic needs of the Commonwealth, its corporations, their shareholders and stakeholders.

Using the Delaware Business Combination Law (Chapter 203, Acts of 1988) as the model, the Commission recommendation would operate as follows:

A person acquiring 5% or more of the voting stock of a domestic corporation (incorporated in Massachusetts) would become an "interested shareholder" prohibited from engaging in any "business combination," as defined by statute, with the corporation for three years unless any of the following exceptions applies:

1) the board of directors approved the transaction before the 5% threshold was triggered;

2) the "interested shareholder" acquired 85% or more of the outstanding shares, excluding those owned by management or management-controlled ESOPs;

3) there was an "auction" for the corporation where the board of directors indicated their interest in selling the corporation to the highest bidder in which case the "interested shareholder" could participate without restriction; and

4) the board of directors and 2/3 of the "disinterested" shareholders approved the transaction after the 5% threshold was triggered.

The Commission recommended lowering the trigger threshold from 15% to 5% to strengthen the proposed business combination law's deterrent effects on two-step mergers, under-financed or over-leveraged takeovers and on acquirors interested primarily in purchasing shares for greenmail or arbitrage purposes. The general effect of this modification is to provide increased incentives to a potential buyer to negotiate directly with the board of directors or to ensure that its offer to shareholders is sufficiently attractive to acquire an 85% ownership position in a target to avoid the three-year business combination prohibition.

The Commission considered raising the ownership level exception from 85% to 90%. The business combination proposal initially considered by Delaware originally provided for a 90% exception. However, the Delaware legislature decided, in the absence of empirical information about the number of transactions that resulted in 85% and 90% ownership levels, that it would be wiser to adopt the lower 85% exemption level to minimize the basis for constitutional challenge. One of the grounds for upholding the Delaware law to date has been that it is not designed to stop all hostile takeovers, only a specific class of abusive transactions, and that the 85% exception gives hostile offerors a meaningful opportunity to consummate their offers and receive full control despite management opposition. BNS Inc. v. Koppers Co., 683 F. Supp. 485 (D. Del. 1988) and RP Acquisition Corp. v. Staley Continental, Inc., 686 F. Supp. 476 (D. Del. 1988). The Commission reviewed data unavailable to Delaware when it enacted Section 203 which provides information on the numbers of transactions that would have met 85%, 90% or 95% ownership levels from trigger levels of 1%, 5%, 10% and 15% for a sample of completed offers, both friendly and hostile, between 1982-7. See Table 9-1. It indicates that with a 5% trigger, slightly more than half (51.2%) of the hostile offers completed met an 85% ownership exception. Raising the

ownership exception to 90% reduces the percentage of hostile offers that qualify for the ownership exception to 38.8%. Given the importance of this exception in determining the constitutionality of the business combination statute, the Commission decided that it would be better to retain Delaware's 85% ownership exception that appears to meet court scrutiny. It is important to note, however, that these numbers pre-date enactment of the Delaware statute that made obtaining an 85% ownership level a relevant consideration in a hostile takeover.

The Commission also considered and rejected the option of extending the business combination prohibition from three to five years in order to increase the effectiveness of the proposal. The Commission's sense was that extension of the prohibition period beyond three years would have little effect. The costs of servicing and paying down the principal on the large amounts of debt incurred in the kinds of transactions a business combination statute is designed to deter would mean that a three year asset freeze would be more than adequate to prevent the transaction. Lengthening the prohibition period was seen as an unnecessary modification that would not significantly increase effectiveness but might conceivably make the proposal more vulnerable to legal challenge.

TABLE 9-1: TRIGGERS AND OWNERSHIP LEVELS, 1981 - April 1988

Trigger	Exception	Number (%) of hostile transaction which would have been excepted	Number (%) of friendly transactions which would have been excepted *
1%	95%	25 (15.4%)	82 (27.6%)
1%	90%	56 (34.5%)	140 (47.0%)
1%	85%	73 (45.0%)	154 (51.0%)
5%	95%	28 (17.2%)	89 (29.9%)
5%	90%	63 (38.8%)	151 (50.0%)
5%	85%	83 (51.2%)	167 (56.0%)
10%	95%	33 (20.3%)	93 (31.3%)
10%	90%	73 (45.0%)	158 (53.0%)
10%	85%	96 (59.2%)	176 (59.0%)
15%	95%	34 (20.9%)	96 (32.3%)
15%	90%	77 (47.5%)	165 (55.0%)
15%	85%	99 (61.1%)	184 (61.0%)

*For comparison only since "friendly" transactions would not be subject to these restrictions since they have prior board approval.

Source: Professor Donald Margotta, College of Business Administration, Northeastern University.

C. Require Assumption of Union Contracts

The Commission is acutely aware of and troubled by the potential short-term, negative impact on stakeholders, particularly employees, associated with dislocations or pay cuts following a control transfer and the long-term effects these may have on morale and productivity. It is also deeply troubled by indications that certain highly-leveraged takeovers appear to be "financed" to a significant degree through transfer payments from employees in the form of wage and benefit cuts or layoffs. While layoffs and wage/benefit cuts may be necessary in some instances for a firm or industry to operate efficiently and competitively in the global marketplace, the Commission was very concerned by the apparent policy adopted by the National Labor Relations Board (NLRB) and the federal courts in interpreting the National Labor Relations Act (NLRA) provisions regarding the continuity of collective bargaining agreements in the takeover context. As currently interpreted, the NLRA does not uniformly require the assumption of duly negotiated collective bargaining agreements by acquiring firms. Depending on the nature of the transaction by which control is transferred and the industrial sector of the target firm, the NLRB may find that the acquiror is a "successor" with obligations to recognize and bargain with the union. However, an NLRB determination of "successorship" does not require that the acquiror start negotiating from the wage and benefit levels established in the collective bargaining agreement negotiated with the previous employer. Under current federal law, the acquiror is free to set new terms and conditions as he re-hires workers from the prior employer's workforce and begin negotiations, even if the NLRB determines he is a "successor" to the contract.

Federal court decisions upholding this NLRB interpretation of the Act cite the importance of wage/benefit flexibility and labor mobility in the process of restructuring and revitalizing mature industries and industries subject to increasing foreign competition. While acknowledging the importance of these factors to our competitiveness, the Commission questions whether the most effective means of pursuing these objectives is by selectively undermining the relevance of collective bargaining agreements. Although the NLRA was not designed to assure organized labor with specific outcomes in terms of wage and benefit levels, it was intended to protect the integrity of the collective bargaining process. The Commission's sense that the current interpretation of the NLRA "successorship" provisions undermines the integrity of the process and, therefore, recommends that the NLRA be amended to require the assumption of collective bargaining agreements negotiated with the previous employer for the term of the contract. This recommendation would protect the integrity of the collective bargaining process and the expectations of workers covered by a duly negotiated collective bargaining agreement. It would not necessarily prevent concessionary bargaining following a transfer in control. However, it would ensure that the employer and employees began such negotiations on a "level playing field." This recommendation would also not prevent an employer from laying workers

off. It would, however, ensure that such layoffs were done consistent with the seniority and severance provisions of a previously negotiated collective bargaining agreement.

The Commission generally supports, but is concerned by, the legal implications surrounding enactment of state legislation that would effectively reverse existing federal interpretations of the NLRA. However, Delaware has recently enacted legislation (220 Stat. 1988) that would prohibit the impairment of the labor contract rights of in-state employees of Delaware corporations. Illinois has also enacted legislation (Public Act 85-300, Laws 1987) to accomplish this same purpose. The Delaware language appears to provide the most comprehensive protection. Therefore, the Commission recommends adoption of legislation based on the Delaware model as a means of protecting the economic and contract interests of Massachusetts workers covered by collective bargaining agreements and as a means of sending a clear message to Congress concerning the Commonwealth's position on this issue.

D. Dislocation Chargeback

The Commission is acutely aware of the broad variety of concerns raised by takeover-related activities, including, but not limited to, disruptions to employees, communities, consumers, suppliers and creditors; and deterrents to long-term investment in R&D, product, market and human resource development and physical plant. However, the sense of the Commission is that the state should not, even if it could, seek to prevent all takeovers since they are an integral part of the process of "creative destruction" which fosters productivity and competitiveness and ensures job creation and long-term economic growth. There was a general consensus among the members of the Commission that takeover-related disruptions and dislocations are most appropriately viewed as a special subset of the disruptions employees, communities, consumers, suppliers and creditors face due to technological and societal change and their effects on product and industry life cycles. These disruptions and dislocations can lead to the creation of new jobs, new industries and, in economic terms, the creation of new wealth. However, the Commission was deeply concerned that in many cases these long-term benefits may not accrue to those who bear the short-term costs. Historically, this type of mismatch in social costs and benefits has been mitigated through government programs, the most obvious being the unemployment security system, funded jointly by employers and government, to provide temporary income maintenance to dislocated workers. The "dislocation chargeback" proposal described below is an expansion of this model to ensure cost sharing between employers and government to maximize the opportunities for dislocated workers to re-enter the workforce as quickly as possible. The importance of the issues surrounding worker and community dislocation this proposal is designed to address has received special attention in light of increasing numbers of "bust-up" takeovers. However, the proposal itself is not limited to dislocations caused by takeovers for two reasons. First, the Commission felt strongly that treating workers dislocated following a

takeover differently from workers dislocated for any other reason created an inequity that could not be justified. Second, the Commission members also felt that the problems associated with defining the term "takeover" for these purposes could not be adequately addressed.

The Commonwealth, through the Executive Offices of Economic Affairs and of Labor, offers a broad variety of services and benefits to Massachusetts workers dislocated through plant closings or layoffs to expedite their re-employment and facilitate economic transition. The programs most often cited in this context were created by the Mature Industries Act as a response to growing concerns about worker/community dislocation caused by structural economic change as Massachusetts continued to move from mill-based to more technology intensive manufacturing methods. These programs include the plant closing and re-employment assistance benefit programs implemented under the joint supervision of the Executive Offices of Economic Affairs and Labor by the Department of Employment and Training (DET) and the Worker Assistance Centers run by the Industrial Services Program (ISP). Other programs created by the Mature Industries Act including the business assistance component of the ISP and the Economic Stabilization Trust (EST) play critical roles in assisting firms facing plant closings to begin the process of modernization and revitalization. Other state programs unrelated to the Mature Industries Act have also played significant roles in this context, including the Bay State Skills Corporation (BSSC). Although none of these programs was established specifically as a response to takeover-related dislocation, each can serve to cushion the immediate employee and community dislocations and disruptions often associated with takeovers.

Currently, these programs are funded almost entirely through a combination of state and federal (Job Training Partnership Act, Title III) monies. In this way they differ radically from the unemployment security model which is based on two assumptions: 1) since labor dislocation/mobility in general produces long-term social benefits at the expense of the specific individuals dislocated, society should underwrite, to some degree, those personal costs to ensure the broader benefits; and 2) since employers play a key role in the dislocation of workers and enjoy many of the benefits of labor mobility, they should pay a substantial share of the social costs associated with labor dislocation/mobility with the taxpayers picking up the remainder. Over the years, Massachusetts has determined that the UI system alone is not adequate to meet our need for the highly-skilled and flexible workforce essential to sustained growth. The Mature Industries Commission, composed of business, labor, academic and public members, concluded that the additional services and benefits offered by the programs described above were necessary to deal effectively with worker/community dislocation. However, the innovative nature of these programs requires that they be funded largely with state dollars.

The "dislocation chargeback" proposal is, in essence, a proposal to require employers that place increased demand on these programs to assume their share of the costs. In this respect it resembles any

experience rated insurance system whether unemployment or automobile collision insurance. Many firms voluntarily assume this cost-sharing responsibility by contributing operating funds and facilities for Worker Assistance Centers. The ISP receives approximately $5 from the private sector for each taxpayer dollar it spends. Similarly, BSSC training programs are funded on a 50-50 match basis.

The Commission's recommendation contains two components: 1) a 100% chargeback to employers for all re-employment assistance benefits (RAB) paid by the state; and 2) full reimbursement to the state for employment and training services offered in response to worker dislocations. Under the Mature Industries Act, all employers of 50 or more workers are expected to give the Department of Employment and Training (DET) and their workers 90 days notice of a covered plant closing (defined as a 90% reduction in workforce over 6 months) or of a covered partial closing as defined by regulation. If an employer fails to give 90 days notice, the state pays each affected employee RAB benefits as a supplement to his/her unemployment compensation for each day, up to 13 weeks, that the employee did not receive notice. While this system provides workers with added security while looking for new work, it provides no incentive for employers to give their workers notice. In fact, there is concern that this system in fact creates incentives for not giving notice where employers want to maximize monetary benefits to their workers without having to pay for them.

The Executive Office of Administration and Finance (A&F) and House and Senate Ways and Means have all expressed concern over rising RAB costs to the state and the lack of incentives for employers to give notice. A&F estimates a 100% employer chargeback of RAB benefits would cost, on average, approximately 3 weeks of payroll or about 24% of the cost of carrying the payroll for the 3-month pre-notification period. The first component of the Commission recommendation would require any Massachusetts employer who fails to give the required notice such that the state must pay his employees RAB benefits reimburse the state for the full amount of those benefits. Table 9-2 provides preliminary estimates of the potential costs of this component of the proposal based on past RAB payments to dislocated workers. However, it is important to note that the entire cost to an employer of this portion of the "dislocation chargeback" proposal can be eliminated at the employers discretion by providing the 90 day notice standard established by the "Social Compact" contained in the Mature Industries Act, M.G.L. c. 149, §182.

The second component of the Commission's "dislocation chargeback" proposal would require 100% employer reimbursement of state expenditures for state employment and training services provided to workers affected by plant closings and layoffs. Preliminary estimates based on past program experience indicate a cost to employers of approximately $2,170 per affected employee: approximately $1,800/ employee for services provided through a worker assistance center (counseling, placement and referral services) and $370/employee to cover services provided by and the administrative costs of DET. Additional training costs are generally paid for with federal funds

TABLE 9.2: RESEARCH re: RAB CHARGEBACK MECHANISMS

I. Basic Assumptions: Direct Cost of Serving a Dislocated Worker (separated with no notice)

o	Full RAB benefits* (13 wks. at $124 per wk.)	$1,612
o	ISP program, retraining and admin. costs	$1,800**
o	DET employment service program and admin. cost per client placed	$ 370
	TOTAL	$3,782

* No Health Insurance cost estimate, as RAB program pays H.I. premiums only in cases of bankruptcies.

** Cost per entered employment. Does not really reflect cost of retraining a person, since other funding sources (e.g. TAA, community colleges, etc.) usually finance a share of the true cost. source: EOEA.

II. Admin. Costs

DET Functions	Cost Per
1) Liability Determinations (determining which corporation is the employer after a sale, merger, acquisition, etc.)	$100
2) Certifying an employer as required to advance/ reimburse $ for RAB.	$200
3) Billing an employer, for repayment of RAB expenditures for former employees (monthly: Min. 5 per layoff)	$115
4) Refunding to employers $ not expended from the security deposit o Certification of refund: $200 o Prep. of refund check: $ 35	$235
5) Appeals Process	$625

NOTES:

1) Security deposits, held in a special account by the State Treasurer, might earn 6 percent per year.

2) No estimate is included here for compliance enforcement activity, as it would depend on the amount of funds due and the penalties established in the law (e.g. denial of license to operate, civil, criminal)

3) These costs estimates are an "added cost" basis. It is very likely federal cost sharing rules would require the state to cost share a larger portion of the existing DET Tax Liability unit if DET tax decisions also decided RAB liability questions.

CORPORATE TAKEOVER ACTIVITY: RAB

I. Up-front "security deposit" required for new corporations buying another

Assumptions: 1,000 firms = annual workload (all large enough for RAB certification)

(1) 1,000 liability determination cases
(2) all cases need to be processed through RAB eligibility certification
(3) one billing per certification (to obtain deposit)
(4) 10% of cases have shut-downs eligible for RAB
(5) 10% appeal
(6) those not affected by shut-downs request refunds at the end of two years

Cost

(1)	1,000 x $100 =	$100,000
(2)	1,000 x $200 =	200,000
(3)	1,000 x $ 25 =	25,000
(4)	100 x $115 =	11,500
(5)	100 x $625 =	62,500
(6)	900 x $235 =	211,500
	TOTAL =	$610,500

II. Security Deposits Required (at 100% RAB Risk)

(1)	1,000 firms x 100 employees =	100,000 potential clients
(2)	cost of Serving/Retraining/Placement =	$ 3,782 per client
(3)	Full-cost security deposits =	$378,200,000
(4)	Interest earnings (6% per annum) =	$ 22,692,000

and would, therefore, not be subject to a state chargeback. This component would formalize what large portions of the Massachusetts business community currently view as responsible behavior and would ensure that all employers meet this standard of conduct. In its consideration of this aspect of the proposal, the Commission has noted on several occasions the importance of including an offset mechanism which would 1) allow corporations offering programs or funding for transitional employment and training programs to deduct such contributions from the costs for they which they would otherwise have to reimburse the state; and 2) create incentives for corporations to continue making such contributions. The Commission has not had an opportunity to develop the specific content of such an offset mechanism. However, failure to effectively account for the offset of corporate contributions to employment and training programs designed to assist workers and communities in adjusting to economic dislocations/disruptions could result in a net loss in the amount of resources, private and public, available for this purpose.

In light of recent enactment of federal legislation requiring mandatory 60 day notice of a layoff of 33% of the workforce or 500 full time employees, fundamental changes in the delivery of dislocated workers programs may be anticipated. Regulations and implementation plans which would define the roles of the states, the federal government and the private sector in this context are currently being developed. While the Commission strongly supports the principles embodied in this proposal, its recommendation may require modification after additional information becomes available.

It is the general sense of the Commission that this proposal would create incentives for all firms to provide employees with maximum notice of plant closings or layoffs by requiring the equivalent of severance pay for failure to provide such notice. It would also reimburse the state for program expenditures associated with facilitating/expediting dislocated worker transition thereby reducing the negative effects of such disruptions on workers and communities and expanding opportunities for dislocated workers to become active and productive participants in growing sectors of the economy. The proposal makes no distinction between employer obligations based on the cause of dislocation, whether from merger, hostile takeover, restructuring or leveraged buyout. Further, it makes no distinction between incumbent and "raider" management. The sole trigger is the dislocation of a worker. There was a general sense among the Commission members that the "dislocation chargeback" proposal could create disincentives to "bust-up" takeovers where the control premium was funded primarily through transfer payments from employees by requiring an offeror to factor the social costs, as measured by the potential "chargeback," associated realizing such profits into the transaction from the outset.

E. Clarification of directors' fiduciary duty

The growing experience with takeovers both friendly and hostile demonstrates that corporate directors are facing extremely difficult decisions that can have dramatic effects on a variety of interests beyond the corporation itself and its shareholders with increasing frequency. These include corporate employees, the communities they live and work in, suppliers, creditors, consumers and others. There is growing evidence that the decisions directors must make in this context also affect local, state and national economies, job creation, economic growth and our competitiveness. Adoption of the Commission's recommendation for legislation based on a business combination model would further increase the likelihood that a board of directors will deal directly with the difficult issues raised by an unsolicited offer for control. Uncertainty about a director's fiduciary duty and, therefore, potential liability may limit directors' consideration of all the factors relevant to making a balanced evaluation of an offer on behalf of these very different interests. Therefore, the Commission recommends support for the legislation filed by the Senate and House Chairs of the Joint Committee on Commerce and Labor and by the Administration (S. 1502/H. 4741) to clarify existing state law concerning corporate directors' fiduciary duties. The sense of the Commission was that these bills would foster an environment which permits directors to responsibly balance short-term shareholder interests against their long-term interests as represented by the continued independence of the corporation as well as the interests of potentially affected employees, communities, suppliers and creditors with confidence that they would not be personally liable for a breach of their fiduciary duty.

Under current Massachusetts law, a corporate director must act "...in good faith and in a manner which he reasonably believes to be in the best interests of the corporation..." and with "...such care as an ordinarily prudent person in a like situation would use under similar circumstances." M.G.L. c. 156B, §65. Section 65 also lists the kind of information and financial reports directors may rely on. These provisions offer guidance. The do not, however, specifically define the types of interests which corporate directors may consider. Therefore, for practical purposes, the exact meaning of the fiduciary standard has been left to case-by-case interpretation by the courts in shareholder suits. While court decisions provide clear guidance after the fact about what may not be considered under the fiduciary standard, they do not reduce general uncertainty caused by the open-ended nature of the current language. As a result, the safest course of action for a director is to interpret his fiduciary duty exclusively in terms of the short-term interests of the corporation and its shareholders whether or not this serves their long-term interests or the interests of the stakeholders in a corporate economy.

The proposed language would clarify what factors could be considered by directors in determining whether a particular action was in "the best interests of the corporation." These factors include the interests of "employees, suppliers, creditors and customers; the

economy of the state, region and nation, community and societal considerations; and the long-term as well as short-term interests of the corporation and its shareholders, including the possibility that these interests may be served by the continued independence of the corporation." S. 1502/H. 4741. These bills do not require that a director consider each and every factor in each and every decision made. It is a clear recognition, however, that short-term corporate or shareholder interests need not be the only factors considered to determine "corporate best interest." If enacted, these bills would make it absolutely clear that a director could consider a broader range of factors without risking liability.

F. Amend M.G.L. c. 110C §3

M.G.L. c. 110C requires an entity or individual acquiring or making an offer to acquire a corporation doing business in Massachusetts to notify the target and the Secretary of State on the date the bid commences and to publicly announce its terms and conditions. Chapter 110C also requires that if a person/entity purchases 5% or more of company doing business in Massachusetts, unless he announces his intention of making a takeover bid, he will be prohibited from doing so for one year, M.G.L. c. 110C, § 3 (the so-called "penalty-box" provision). These requirements, where enforceable, made Chapter 110C the earliest source of information regarding unsolicited bids for control of Massachusetts corporations. Chapter 110C is also the only statute of its kind to be used to successfully enjoin a takeover nationwide. However, as discussed in greater detail in Section VII(C) above, the Commission determined that there are some problems in Chapter 110C's implementation. The <u>Hyde Park</u> decision, 839 F.2d 837 (1st Cir. 1988), invalidated the so-called "penalty-box" provision, removing Chapter 110C's central enforcement mechanism. There are additional jurisdictional problems in obtaining subpoenas for information and individuals to testify at hearings authorized by Chapter 110C which have led the Secretary of State to enforce the law only when specifically requested to do so by a target corporation.

The Commission recommends several technical amendments be made to M.G.L. c. 110C to cure constitutional defects specifically cited in the <u>Hyde Park</u> decision or which flow more generally from the guidelines established by the <u>Edgar v. MITE</u> decision. In each case, the utility of these recommendations rests of the assumption that the Supremacy Clause analysis contained in the <u>Hyde Park</u> decision can be reversed based on the differing rationales used in <u>MITE</u> and <u>CTS Corp. v. Dynamics Corp of America</u>, 107 S.Ct. 1637 (1987).

The Commission recommends the following amendments to M.G.L. c. 110C:

> Amend the "penalty box" provision, Section 3, to substitute substantial monetary fines for failure to meet notice and disclosure requirements in place of the current prohibition on further purchases. This change might effectively address the

Court's criticism that Chapter 110C was designed primarily as a barrier to takeovers rather than as a genuine information getting mechanism to protect shareholders.

Modify the enforcement provisions to give the Secretary of State the power to levy fines for non-compliance with hearing procedures, including the failure to obey a subpoena issued in a proceeding. This might effectively address the out-of-state subpoena problem, at least as it relates to the production of documents. Personal appearances of parties would still present a problem given the short time frame required by the Act.

Amend Chapter 110C to limit its applications to domestic corporations or to establish a linkage between the target corporation and the state stronger than the corporation's location.

Re-write the disclosure provisions to require that additional information required by the Secretary of State go to investors to undercut arguments that Chapter 110C's primary purpose is to delay takeovers rather than to protect investors.

Notice and disclosure time frames could be modified to match those of the Williams Act to remove any question of actual conflict.

G. Support M.G.L. c. 110D & E Technical Amendments Bill

The Boston Bar Association Committee, which had primary responsibility for the drafting of the Massachusetts Control Share Act, M.G.L. c. 110D & 110E, has submitted technical corrections to their original language. These amendments do not make substantive changes to the original language but make corrective changes based for the most part in minor discrepancies between Indiana and Massachusetts corporations law. Subject to a slightly more detailed review, the Commission recommends enactment of this legislation.

H. Monitor court decisions re M.G.L. c. 110E

As discussed in Section V(C) above, the Commission carefully examined the effectiveness of the Massachusetts Control Share Acquisition Act as applied to foreign corporations, M.G.L. c. 110E, in light of two post-enactment events: 1) the finding that a virtually identical Oklahoma statute was an unconstitutional burden on interstate commerce in TLX Acquisition Corp v. Telex Corp., (W.D. Okla., Nov. 3, 1987); and 2) the Securities and Exchange Commission promulgation of its new "Shareholder Disenfranchisement" rule (Rule 19c-14).

The Commission's general conclusions were that M.G.L. c. 110E might not survive a constitutional challenge, although that determination would have to be made by the courts. It further concluded that even

if Chapter 110E were constitutional, it might be of questionable value to the firms it was designed to protect since SEC Rule 19c-14 would prohibit a public corporation that invoked Chapter 110E in response to a hostile offer from listing or trading its shares on any of the public exchanges. There are, however, questions about the enforceability of Rule 19c-14. Therefore, the Commission recommends that the Commonwealth continue monitoring the legal developments affecting M.G.L. c. 110E before making a final determination on the effectiveness of Chapter 110E.

I. Affirm state role in takeover regulation

The Commission carefully weighed the relative benefits of federal as opposed to state responses to the complex issues raised by takeovers. As noted in the Section describing the overall conclusions of the Commission, there was a general consensus among the members that, if a comprehensive and effective response were likely in the foreseeable future, federal action would be preferable to state action. However, the Commission felt that such a response was not probable and, therefore, that state action was warranted to protect the economic well-being of the Commonwealth and its citizens.

The issues raised by takeovers and takeover-related activities are extremely complex. As a result, it is far from clear what responses, federal or state, effectively and appropriately balance the concerns and needs of corporations, their shareholders and stakeholders and the general public interest in assuring sustained economic growth and job creation. The empirical data needed to answer many of the hardest questions about the effect of takeovers on the future of our economy is not yet available. In some instances, such data will never be available given the impossibility of turning the clock back to see whether different choices would have had been better. Congress has been examining takeovers in an attempt to develop a comprehensive response for more than five years. While it is easy to criticize their failure to act decisively, their lack of action appears to be a function of the failure of any set of proposals to emerge as clearly "right." Under such circumstances, the historical role of states as laboratories for testing the relative effectiveness of different approaches to these issues is indispensable.

Therefore, the Commission recommends that Congress affirm state authority to regulate takeovers and takeover-related activities until it develops a comprehensive and effective response to deter speculative takeovers that do not contribute to real economic growth and often result in substantial dislocations/disruptions for corporate stakeholders but continue to encourage takeovers which increase our efficiency and competitiveness.

J. Support federal efforts for tender offer reform

Consistent with its conclusion that federal regulation of takeovers and related issues would be preferable if it were comprehensive, effective and timely, the Commission recommends support for continuing Congressional efforts to develop responsible legislation to deal with the numerous and complex issues raised by takeovers. Although the Commission has deferred developing specific recommendations on pending federal legislation until it issues its Final Report, it has discussed a number of issues around which there was an emerging consensus. Of these the following provisions of pending legislation appear to be among the more significant:

> Prohibiting the use of pension fund surpluses in the financing of takeovers and related activities to protect the interests of employees in the integrity of their pension investment.
>
> Narrowing/closing the current 10 day filing "window" for purchases of more than a 15% interest in a company to reduce the potential for "creeping" tender offers and other related abuses.
>
> Requiring that all purchases of 15% or more of the outstanding shares of a publicly traded corporation be done by tender offer pursuant to the procedures established by the Williams Act.

The Commission will more closely evaluate the alternate proposals currently pending before Congress and anticipated proposals to be filed in the next Congress for its recommendations in the Final Report.

L. Increase antitrust enforcement

In examining the role of antitrust regulation in deterring harmful takeovers, the Commission reviewed the Sherman and Clayton Acts, the operation of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (H-S-R), the Department of Justice Merger Guidelines and the effectiveness of merger regulation policies at the federal level. The Commission reviewed federal premerger notification and screening procedures and received information about the dramatic increase in the number of merger filings before federal antitrust authorities (4,660 in 1986 and 1987) and the decline in federal challenges to proposed mergers and acquisitions from 2.5% in 1980 to 0.58% in 19886 and 1987. The Commission also noted the short time frames which federal antitrust authorities had to screen what often are very complicated premerger filings, generally 30 days (only 15 days for tender offers) unless federal authorities make a formal request to take a second, more detailed look. In that case, the time period can be extended another 30 days or, under certain circumstances, even longer. It was clear that federal authorities are under very tight time constraints to review large numbers of filings, many of which are highly complex. Legislation filed in the 100th Congress to lengthen these time periods failed to pass.

The Commission also investigated the states' role in reviewing Hart-Scott-Rodino filings of proposed mergers and acquisitions affecting local markets. The Commission learned that before 1984, the Federal Trade Commission (FTC) shared H-S-R filings with states that requested such materials. In 1984, however, the FTC reversed that policy and ruled that it was barred by law from releasing H-S-R information, a ruling upheld by the federal courts. All subsequent attempts to pass federal legislation to permit H-S-R information sharing have been unsuccessful. The business community has consistently opposed H-S-R information sharing on the basis that the confidential information contained in these filings will be at greater risk if premerger filings are given to interested states. There is no evidence, however, of breaches of confidentiality during the period between 1976-1984 when state attorneys general were provided access to H-S-R materials. It was the Commission's sense that antitrust enforcement would be more effective if state attorneys general had access to H-S-R filings and were, therefore, able to exercise their jurisdiction to sue in federal court under the Clayton Act to enjoin anti-competitive mergers.

The Commission also reviewed the information about the radical shift in antitrust enforcement trends resulting primarily from the last Administration's antitrust policies. For the Reagan Administration with its whole-hearted adoption of the "Chicago School" of economic thought, the overriding purpose of antitrust law is to prevent the inefficient allocation of resources. The Chicago School does not accept the central assumption of the Sherman and Clayton Acts that the concentration of economic power is harmful. It instead takes the view that business consolidations are presumed to be efficiency-enhancing and should be permitted, if not encouraged. If a proposed consolidation is harmful to competition, current antitrust policy would dictate investigating into the presence of cost-savings to offset any potential competitive harm rather than a presumption that a consolidation with anti-competitive effects should not be permitted to go forward.

The Reagan Administration's merger policy is embodied in the Department of Justice Merger Guidelines (1984). Through mathematical formulae, the Herfandahl-Hirschman Index, the Guidelines measure the increases in market concentration that are likely to result from any particular merger or acquisition. The Guidelines are designed to identify those mergers and acquisitions that might permit the merged firm to exercise its market power and harm consumers by raising prices. While the Guidelines do recognize the potential for anti-competitive mergers that harm consumers, they have been criticized for giving too much weight to be given to the internal efficiencies that may be gained from otherwise anti-competitive mergers. Consistent with the goal of promoting efficiency, the Guidelines give a qualified "green light" to anti-competitive mergers if there is "clear and convincing" evidence that the merger will achieve significant efficiencies.

On the basis of the information it reviewed concerning federal antitrust policy and the growing sense that lenient antitrust enforcement has contributed to an environment conducive to takeovers, whether motivated by financial or efficiency-promoting considerations, the Commission makes the following recommendations:

Support efforts by state authorities to enact federal legislation to permit federal authorities to share, with appropriate confidentiality requirements, H-S-R materials with states requesting such information. Specifically, the Commission recommends that Section 7A of the Clayton Act be amended to provide a firm's H-S-R filings to state attorneys general for use in official antitrust investigations of mergers or takeovers that affect state markets; that the information acquired would be used only for official purposes by the state attorney general; that guarantees of confidentiality would be required by the attorney general; and that the same sanctions currently applicable to federal employees for unauthorized disclosure would apply to the state attorneys general and their employees.

Amend Section 7A of the Clayton Act to lengthen the period of premerger review currently given federal antitrust enforcement authorities. The Commission recommends that the current 15 day review period for tender offers be extended to 25 days. It further recommends that federal antitrust authorities be permitted to seek an additional review period of 30 days from the courts to examine very large or complex mergers or takeovers.

Support the exercise of Congressional oversight authority into the question of whether the Justice Department's Merger Guidelines are consistent with the Congressional intent expressed in the Sherman and Clayton Acts. The Commission suggests that particular attention be given to the question of whether the Guidelines give undue weight to potential efficiencies that may prove illusory in offsetting the harm anti-competitive mergers can do to consumers.

X. AGENDA FOR FINAL REPORT

A. Introduction

The Commission was unable to complete deliberation on a number of the important issues and proposals placed before it within the timeframe required for issuing this Interim Report. It has, therefore, committed itself to continue the process of evaluating several specific proposals and to analyze several issues which the Commission felt were essential to a comprehensive state response to the effects of takeovers and related activities on the labor, business, banking and investment communities and the Commonwealth's economic well-being. Where appropriate, the Commission intends to make concrete recommendations concerning these issues/proposals in its final report.

The following issues/proposals were placed on the Commission agenda for the Final Report:

Proposal to require, as a matter of equity, some form of severance benefits for all employees where takeover-related compensation plans have been adopted to protect members of management.

Proposal to amend M.G.L. c. 110D & 110E to extend its coverage to include certain regulated industries such as banks, insurance companies and public utilities.

Explore options for encouraging firms to adopt corporate strategies and governance procedures designed to stimulate long-term investments in product, process, market and human resource development, employee participation, profit-sharing, performance-based compensation, expanded participation of outside directors and/or employee representatives on boards and of other modifications assumed to lead to more effective and efficient management, increased productivity and a decreased probability that a firm would ever become a target.

Develop specific positions on pending federal proposals for tender offer reform.

Develop specific positions on pending amendments to federal insider trading requirements.

Examine the issues raised by the use of monies available to institutional investors, particularly pension funds, for takeovers and leveraged buyouts such as the quality of the debt purchased, the long-term security of these monies and of the individuals on whose behalf they are invested.

Further development and analysis of Massachusetts takeover trend data over an expanded timeframe.

B. Fair Labor Standard Proposal

In examining the issues related to the assumption of collective bargaining agreements following transfers of control, the Commission quickly became aware of the complexities of not only the legal but the equity questions raised. The general sense of the Commission was that such agreements should be assumed by the acquirors of corporations. However, serious concerns were expressed about the constitutionality of a state law that would essentially reverse the current federal interpretations of the NLRA. There were also serious concerns expressed about the potential negative side-effects state action could have on the workforce such legislation would be designed to protect. Questions about the equity of limiting the protections a state law might offer to workers covered by collective bargaining agreements but not other members of the workforce were also raised leading to concerns about the effect different proposals might have on the state's business climate, economic growth and job creation. The Commission's general sense is one of concern for the effects of certain highly-leveraged or under-financed takeovers which depend on cuts in the wage and benefit levels of affected workers to finance the debt accumulated in making the acquisition.

Preliminary research indicates the following: 1) the states's general incorporation law (M.G.L. c. 156B) addresses the issue of the assumption of seller corporation liabilities and obligations where there is a clear debtor-creditor relationship established under state law; 2) under federal law, the buyer of a corporation must assume the seller's collective bargaining contract only under very limited circumstances; 3) a state law explicitly requiring the assumption of collective bargaining agreements could be unconstitutional in light of current Supreme Court decisions and pre-emption doctrine in this area, however, there is case law upholding the states' authority to regulate in this area to protect citizen welfare; and 4) a more general requirement under state law aimed at the temporary assumption of "implied" employment contracts might be an effective response to the concerns raised around collective bargaining agreements and provide all employees with greater protection in the control transfer situation.

In this context, the Commission has examined several variations of a proposal to establish a state fair labor standard applicable to all employees in the state which would require that if the "buyer" of a corporation doing business in Massachusetts hires an employee from the "seller's" workforce, he must continue to compensate that employee at the "seller's" wage/benefit levels for a specified period, yet to be determined. In the initial variation considered by the Commission, a National Labor Relations Board determination that a collective bargaining agreement was in force would automatically terminate this "grandfather" period to avoid pre-emption under the National Labor Relations Act. The general pros and cons of this proposal are summarized below.

PROS:

Employees with "implicit" employment contracts would, if rehired, receive the same protections that creditors with explicit contracts do under M.G.L. c. 156B § 80(5)(b).

Closer approximation to equitable treatment for all stakeholders with creditor relations to "buyer" whether through explicit or implicit contracts.

Incentive to "buyer" to factor in social costs associated with employee disruption/dislocation before beginning the transaction

Where "seller" workforce is covered by a collective bargaining agreement and has high wages/benefits, creates incentive for "buyer" to assume the agreement to bargain for concessions while preserving bargaining position of "seller's" former employees.

Deters those highly-leveraged and/or under-financed takeovers which rely significantly on employee wage and benefit cuts to pay down debt accumulated to finance takeover but permits takeovers financed through efficiency or productivity gains to go forward

In conjunction with a business combination law, which would deter "financial" takeovers financed through asset sales, further deters "financial" takeovers by excluding up-front cuts in labor costs as a source of financing.

CONS:

Deprives workers of the option of accepting a wage/benefit reduction in lieu of a layoff.

Creates incentives for "buyer" to not rehire "seller's" workforce where other labor is available, i.e. in high unemployment areas. The effectiveness of such a proposal as a deterrent to "financial" takeovers would appear to vary, therefore, with the overall performance of the economy; less effective when concerns about disruptions and dislocations would be greatest.

In the event of a reduction in the workforce, creates incentives for "buyer" to lay-off the oldest (usually the highest paid and hardest to re-employ) workers first.

Does not directly address the concerns of organized labor regarding the avoidance of collective bargaining agreements through reorganization, consolidation or merger.

Potential NLRA/NLRB conflicts re assumption/successorship which should be minimized through explicit termination of "grandfather" period if collective bargaining agreement comes into force.

May raise NLRA conflicts re "company unions" when re-negotiation begins in a non-union shop.

Possible ERISA conflicts based on mandated benefits.

A second variation of this general proposal was considered which did not provide for the termination of the "grandfather" period based on an NLRB finding that a collective bargaining agreement is in effect, whether assumed by the "buyer" or newly bargained. This variation was designed to address concerns that the original proposal could create incentives for concessionary bargaining that placed employees at a further disadvantage. It essentially raises all the same pros and cons as the original proposal with the exception of the potential effect on concessionary bargaining. However, any incentive to assume the agreement would also appear to be removed placing older workers at greater risk in the event of a lay off.

A final variation proposed at the Commission's final working meeting, would have redefined "termination" for purposes of receiving unemployment insurance and other dislocated worker benefits to include a wage/benefit cut of a specific percentage (e.g. 10%). This would give each employee the choice of whether in his particular case he would prefer to take a wage/benefit reduction or to seek new employment with all the transitional benefits that would otherwise be available. There was substantial interest among the members present in exploring the implications of this proposal as a means of assisting employees negatively affected by takeovers in the process of transition and as a disincentive to "financial" takeovers which use employee wages and benefits as a source of financing for the transaction.

Legislation recently enacted in Illinois and Delaware provide other models for addressing these issues as they affect workers with collective bargaining agreements. The Commission, in its final working meeting, made a commitment to examine and evaluate the relative merits of these various options to develop a formal recommendation for action in this matter for its Final Report.

C. Tin Parachute Proposal

In its final working meeting before issuing the Interim Report, the Commission considered a proposal which would require an employer who offers "golden parachutes" to members of senior management also provide "tin parachutes" to other employees, management and non-management. As proposed, the "tin parachute" would constitute two weeks severance pay for every year of employment service and the "tin parachute" requirement would be triggered by the creation of the "golden parachute" plan rather than payment of benefits to specific employees. A "golden parachute" was defined, for purposes of discussion, as any cash payment, benefit such as pension benefits or stock ownership above the usual salary and benefit package provided senior management in the event of termination or resignation.

The intent of the proposal is to establish a principle of equity in the context of severance benefits paid out in the event of a takeover or corporate restructuring. There are examples of multi-million dollar packages established for and paid to a handful of managers following a takeover with no severance benefits offered to other employees. The proposal was also designed to serve as a disincentive to using employee layoffs as a mechanism for "financing" a takeover transaction by raising the price of layoffs through severance benefits.

Following considerable discussion, the Commission's sense was that as a matter of principle it believed that the use of golden parachutes by key management ought out of a sense of fairness to require some form of tin parachute for all other employees. In adopting a motion to this effect, the Commission made a commitment to further investigate a number of the issues raised by the proposal before formulating a recommendation for the Final Report. The principal issues the Commission felt needed to be addressed included 1) a careful definition of the term "golden parachute" consistent with the intent of the proposal but which was sufficiently narrow to avoid unintended consequences; and 2) a detailed evaluation of the relative merits of having the "tin parachute" requirement triggered by the adoption of a "golden parachute" plan for key management or by the payment of "golden parachute" benefits to key managers. Additional information about this proposal is included in the Working Papers Section of Volume II. Although there was broad consensus among the Commission members that "golden parachutes" raised important equity questions, concerns were also expressed about the value of "golden parachutes" as recruiting devices under conditions of uncertainty, particularly for top managers and technical experts. The effects such a provision might have on the general business climate was also raised as an area for concern.

D. Extension of M.G.L. c. 110D & 110E

The Commission considered proposals to extend coverage of the Massachusetts Control Share Acquisition Act, M.G.L. c. 110D & 110E to include corporations organized under statutes other than M.G.L. c. 156B such as banks, public utilities and insurance companies. In the original drafting of the Commonwealth's control share law, these industries were excluded due to time limitations which prevented full consultation with the industries themselves as well as the Secretary of Consumer Affairs and Business Regulation and the Banking and Insurance Commissioners and the Department of Public Utilities who have jurisdiction over the mergers and acquisitions of targets in these industries. It was the sense of the Commission that excesses and abuses that the control share acquisition and business combination models were designed to address might also occur in these regulated industries. However, absent full consultation with the industries and with the state regulators with primary jurisdiction, a recommendation would be premature. Further consideration of this issue by the Commission is anticipated.

E. Continue investigating the "Scott proposal"

The Commission considered a proposal made by Professor Bruce Scott of the Harvard Business School to encourage Massachusetts firms to adopt more effective and efficient management practices that would enhance productivity and competitiveness and decrease the probability that a firm would ever become a takeover target. There is a general consensus among the Commission members that the components of the Scott proposal are important in preventing takeovers and that prevention through increased productivity and competitiveness is preferable to direct regulation of takeovers. However, a consensus has not been reached on the state's appropriate role in implementing this proposal. The Commission will continue to investigate the means through which the various components of the Scott proposal, described below, can be implemented.

The Scott proposal is a preventative approach designed to improve corporate productivity and performance based on the assumption that "good-performers" are less likely to become takeover targets. It is, therefore, designed to encourage corporate strategies and managerial styles presumed to promote competitiveness in order to obviate the need for direct regulation of takeovers. The proposal appears to be based on several assumptions: 1) an over-emphasis on short-term performance, principally financial, has caused firms to adopt strategies that do not promote their long-term competitiveness; 2) long-term investment in physical plant, product and process commercialization and human resource development are critical to long-term competitiveness; 3) employee commitment and participation in corporate decision-making increase productivity and improve performance; and 4) corporate governance provisions are significant determinants of management accountability.

Under the Scott proposal, a Massachusetts firm would have the option of organizing under an "Alternate Charter" with governance and organizational provisions designed to encourage human resource development, employee participation in and commitment to corporate decision-making and oversight by an independent board of directors. The "Alternate Charter" would provide Massachusetts businesses with another form of business entity to choose from in organizing themselves in the manner they feel best adapted to their goals and the nature of the competition they face. Firms that felt that the requirements of the "Alternate Charter" did not serve their interests would be under no obligation to adopt them.

If a corporation opts for the "Alternate Charter" it must organize itself to include the following four basic components: 1) an incentive compensation plan available to all employees on the same terms; 2) an "employment and stabilization fund" managed by a committee representing employees, management and outside parties (could be experts or stakeholders) to invest in any legitimate business interest/opportunity that furthered the long-term interests of the corporation; 3) a corporate commitment of 2% per year of Massachusetts payroll for skills upgrading and/or retraining of Massachusetts employees; and 4) a board of directors with only one

inside director who cannot serve as chair. The incentive compensation plan is designed to increase employee productivity and the commitment of both employer and employee to production quality and employment continuity. The "employment and stabilization fund" is designed to encourage a consultative decision-making process at all levels concerning the long-term goals and objectives of the firm and the strategies and investments required to make them a reality as well as to provide a mechanism for tapping the practical experience of employees on a day-to-day basis. The training commitment is designed to give employees access to the skills training and upgrading needed to ensure the highly skilled and flexible workforce essential to long-term competitiveness. The board structure is designed to encourage independent and professional management oversight.

The Scott proposal assumes that, although there is a growing consensus that the above components may be essential to long-term competitiveness, many managers might not be willing to adopt these methods absent certain incentives. In the original proposal, the basic incentives were in the form of state and/or federal tax deductions to the corporation for funds invested in the "employment and stabilization fund" and spent for training and skills upgrading. The original proposal also provided employees with a state income tax exemption for all income received pursuant to the incentive compensation plan. As a result of the deliberations of the Commission, the option of providing firms adopting the "Alternate Charter" with added protections from takeover has been raised. Although the main premise of the Scott proposal is that firms adopting these strategies would out-perform their competitors and, therefore, not need such added protections, the idea of added anti-takeover protection was considered important as a means to further encourage long-term investments in light of the short-term pressures caused by takeovers.

F. Role of Pension Funds in Takeovers

Recent hostile leveraged-buyouts of gigantic corporations financed largely with pools of capital provided by pension funds underscore the significance and changing roles of institutional investors in takeovers and takeover-related activities. Commission members expressed a variety of concerns about the roles of institutional investors, particularly pension funds including: 1) the long-term quality of takeover-related investments in terms of their obligations to the individuals for whom they are investing these monies; 2) the immediate impact the growing numbers of highly-leveraged deals have on even the high quality "paper" in pension fund portfolios following the ever more frequent downgrading of investment-grade bonds after a takeover, leveraged buyout or restructuring; 3) effect these trends have on the general operation of American capital markets where equity investments are increasingly being replaced by debt financing; and 4) the more subjective issues surrounding the appropriateness of using employee pensions to finance takeovers that may result in the loss or destruction of productive jobs.

The Commission felt strongly that it should make a commitment to explore these and related issues in the next several months and, if appropriate, to develop recommendations for action.

XII. APPENDIX A: SCHEDULE OF MEETINGS AND SPEAKERS

MEETING SCHEDULE

All meetings scheduled from 8:30 - 11:00
Location as indicated

March 3 - Governor's Office, State House - Room 360, Boston

Organizational meeting

March 30 - One Ashburton Place, Boston - 21st Floor, Conference Room # 3

Discussion of the philosophical underpinnings/justifications for state regulation of takeovers

Joseph Auerbach - Partner, Sullivan & Worcester, Professor, Harvard Business School (retired) -

Presentation on the evolving/changing role of the corporation in society addressing changing views on the sharing of social costs and benefits associated with economic transition/dislocation

Robert Reich - Professor, John F. Kennedy School of Government -

Response and commentary

April 13 - 225 Franklin Street, Boston, Ropes & Gray, 28th Floor Conference Room

Panel/discussion reviewing the economic implications of various approaches to corporate takeover regulation. Participants:

Richard Zeckhauser - Harvard Business School
Bruce Scott - John F. Kennedy School of Government

April 27 - 225 Franklin Street, Boston, Ropes & Gray, 28th Floor Conference Room

Panel/discussion reviewing various state takeover regulation models and regulatory models currently under consideration by the various states. Participants:

John Pound - John F. Kennedy School of Government
Louis A. Goodman - Skadden, Aros, Slate, Meagher & Flom
Stephen W. Carr - Goodwin, Proctor & Hoar
Craig B. Smith, Esquire, Lassen, Smith, Katzenstein & Furlow

May 18 - 225 Franklin Street, Boston, Ropes & Gray, 28th Floor Conference Room

Discussion meeting for Commission members

June 1 - One Ashburton Place, Boston - 21st Floor, Conference Room # 2

Panel/discussion on federal role in takeover regulation, including the antitrust perspective

Edward Leahy, Special Counsel to the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce

Edward Correia, Chief Counsel of the Subcommittee on Antitrust, Monopolies and Business Rights of the Senate Judicary Committee

June 15 - 225 Franklin Street, Boston, Ropes & Gray, 28th Floor Conference Room

Panel presentation. Participants:

Eric Rosengren, Economist, Federal Reserve Bank of Boston

Howard Forman, Senior Research Analyst, Food and Commercial Workers Union

Discussion meeting for Commission members

June 22 - Gardner Auditorium, State House, Boston

Hearing to obtain opinions/recommendations of various stakeholders

Panel I
Bruce Scott, Professor, Harvard Business School

Panel II
Arthur Osborn, President, Massachusetts AFL-CIO
Edward Holmes, United Food and Commercial Workers Union Business Agent to Filene's and Jordan Marsh
Robert LeMire, Legislative Director, International Association of Machinists and Aerospace Workers
Tom Climo, Director, Amstar Workers Assistance Center

Panel III

Jamie Heard, formerly of United Shareholders of America

Paul E. Tierney, Esquire, Gollust, Tierney and Oliver (Coniston Group)

Panel IV

Joseph E. Mullaney, Senior Vice President, Legal Gillette Corporation

Paul D. Weaver, General Counsel, Houghton Mifflin

July 13 One Ashburton Place, Boston - 21st Floor, Conference Room # 3

Commission discussion meeting to produce draft outline for interim report

August 17 - One Ashburton Place, Boston - 21st Floor, Conference Room # 3

Discussion meeting to comment on and review preliminary draft

September 7 - One Ashburton Place, Boston - 21st Floor, Conference Room # 2

Discussion meeting to comment on and review draft recommendations

October 3 - 225 Franklin Street, Boston, Ropes & Gray, 28th Floor Conference Room

Discussion meeting for further comment on and review of draft recommendations

October 19 - 225 Franklin Street, Boston, Ropes & Gray, 28th Floor Conference Room

Discussion meeting to review and revise draft interim report

November 2 - One Ashburton Place, Boston - 14th Floor, Board of Regents Conference Room

Discussion meeting to review and adopt final version of interim report

November 14 - 225 Franklin Street, Boston, Ropes & Gray, 28th Floor Conference Room

XIII. APPENDIX B: NATIONAL AND STATE TREND DATA

NATIONAL AND STATE TREND DATA

November, 1988

(The Commission to Review Massachusetts Anti-takeover Laws)

NATIONAL AND STATE TREND DATA

November, 1988

Table of Contents

NATIONAL AND STATE TREND DATA

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Tables, Lists & Figures

I. Introduction

Two sources of information have been developed to support the investigatory aspects of the Commission's work. These are the Commission Database and a review of sample merger and acquisition data for the State and the Nation. These two sources have remained independent of each other insofar as data collection has been concerned. They are, however, linked conceptually for purposes of application. The overall goal of this effort is the identification of trends in takeover activity and the projection of their probable impact on the State's economy.

The data described have led to certain observations pertaining to trends in takeover activity for the State as well as the Nation. A rigorous attempt to quantify and study those observations requires further, more scientifically based work. Only on such a basis can definitive conclusions be drawn where they are now only suggested. At present, the Commission Database serves as a backdrop to discussions about these probable trends. With more rigorous analysis, however, the database will become the subject of applications derived from analytical conclusions.

II. The Commission Database

1. Purpose

The Commission Database was developed to serve as a research tool which could help the Commission understand trends and potential consequences of corporate takeover activity in Massachusetts. Its design considers the need to have a definitive source with detailed data for future analytical work on this subject. No other use is intended nor is any other capability designed into its structure.

2. Description

The Commission Database contains records on 845 publicly held corporate entities located in the Commonwealth. These entities are either corporate headquarters, subsidiaries, or headquarters of a subsidiary. The database provides the capability of isolating key attributes (fields) within each record as well as across records. This capability is the basis for analysis of variables represented in the data.

Each record in the database is identified by fourteen discrete attributes as follows:

- **Company Name**
- **City** (in which the corporation is located)
- **Primary SIC**
- **State of Incorporation** (for this entity)
- **Employees** (range as an indicator of size)
- **Sales** (gross range as an indicator of size)
- **Headquarters in Massachusetts** (yes or no)
- **Subsidiary of a Parent Company** (yes or no)
- **Exchange** (on which this entity is listed)
- **Parent Name** (if applicable)
- **Parent State** (if applicable)
- **Parent State of Incorporation** (if applicable)
- **Anti-Takeover Provisions**

The database is not yet fully complete. The extent to which records have been completed varies considerably within the overall database. As a result of this status, there remain limitations on its useage and applicability. Currently, approximately one half of the records in the database are complete. An ongoing search is being conducted for additional data sources to fill select gaps.

Extrapolation based upon the number of sources examined indicates that the database contains records representing over 95% of all public companies with Massachusetts headquarters at this time. The exact number and contents of records in the database are subject to ongoing research focused on continuing refinement of data. Corporate records may be added, edited, or deleted as a reflection of this work.

3. General Observations

The present database is a good starting point to what could potentially be a tremendously versitile, powerful and valuable set of tools for predicting the probable occurence and impact of corporate takeovers on the Commonwealth and its citizens. As it presently stands, however, the database is only a static view of a segment of this highly dynamic environment. Additional steps could be taken which would enable the development of a much more powerful set of tools. This work should take advantage of the foundation already provided by the Commission Database.

II. Sample Merger and Acquisition Data

1. Purpose

Sample merger and acquisition data were assembled to provide the Commission with a "snapshot" view of a segment of the corporate takeover environment for the Commonwealth and the Nation. This sampling is by no means a comprehensive analysis. Rather, it is the result of an ad hoc approach designed to reveal the sort of data which are available to support the ongoing efforts of the Commission. These data are in no way being presented as representative of the overall merger and acquisition environment for the Commonwealth or the Nation.

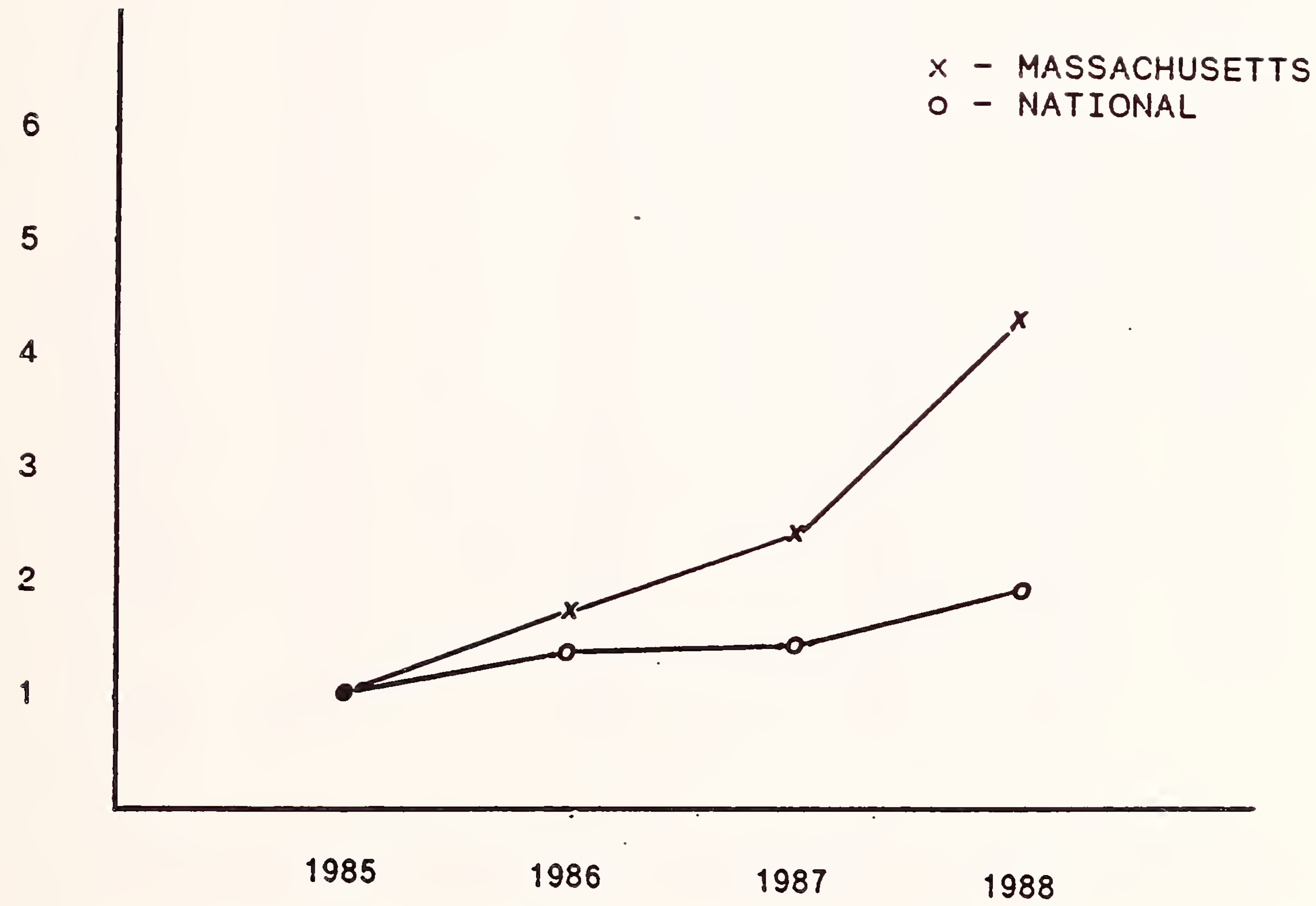
2. Focus of the Research Effort

The target population for the current effort was limited to headquarters of publicly held companies. As with the Commission Database, this included headquarters which were also subsidiaries of other companies. Two particular facets of these companies and their environment were the primary interests of the present research effort. These were Standard Industrial Classifications (SIC's) and merger & acquisition filings.

As context, figure 1 provides a view of the rate of growth in M&A filings overall. The rate of growth in M&A filings for the Nation is contrasted against the rate of growth for the Commonwealth. These rates were calculated as a factor of the number of filings in the base year (1985). Note that the rate of growth in Massachusetts appears to have been higher than in the Nation as a whole.

The present data collection efforts have focused on certain SIC's, selected on the basis of assumptions regarding the distribution of industries throughout the Commonwealth's economy. Table 1 displays the patterns of distribution in both Massachusetts and the Nation for the SIC's selected. This sample of SIC's was found to represent approximately 97% of the target population for Massachusetts and approximately 91% for the Nation. Table 1.b provides descriptions of the SIC's selected. These data also illustrate the concentration of businesses represented by these SIC's, using Massachusetts as a geographical focus. Each industrial sector (SIC) is taken as a national aggregate figure and weighed against the proportion of those companies with headquarters in Massachusetts.

figure 1



RATE OF GROWTH IN M&A FILINGS

1985 - 1988e

(base year 1985 = 1.0)

Table 1

DISTRIBUTION OF PUBLIC COMPANY HEADQUARTERS
BY STANDARD INDUSTRIAL CLASSIFICATION (SIC)

SIC	NATIONAL	MASSACHUSETTS	(A)	(B)	(C)
13	866	7	3.8	.9	.8
15-17	851	22	3.7	2.8	2.6
20	642	15	2.8	1.9	2.3
27	611	19	2.7	2.4	3.1
28	802	32	3.5	4.1	4.0
30	542	27	2.4	3.5	5.0
34	805	26	3.5	3.3	3.2
35	1420	73	6.2	9.4	5.1
36	1274	73	5.6	9.4	5.7
37	465	9	2.0	1.2	1.9
38	825	53	3.6	6.8	6.4
45	219	0	1.0	0	0
48	777	15	3.4	1.9	1.9
50-51	2964	79	13.0	10.1	2.7
54	292	5	1.3	.6	1.7
56	370	29	1.6	3.7	7.8
60	2365	103	10.4	13.2	4.4
63-64	1483	29	6.5	3.7	2.0
73	2744	120	12.0	15.4	4.4
89	423	21	1.9	2.7	5.0
	====	===	====	====	
Total	20740	757	91%	97%	

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In current sample data:

Total public headquarters for "national" = 22,812 = X

Total public headquarters for "Massachusetts" = 780 = Y

A = percentage of "X" represented by each SIC for "national"
(total representation for all SIC's listed is 91% of "X")

B = percentage of "Y" represented by each SIC for "Massachusetts"
(total representation for all SIC's listed is 97% of "Y")

C = "Massachusetts" as a percentage of "national" for each listed SIC (mean value is 3.5% among listed SIC's)

Data Source: "Dun's Market Identifiers", Dun & Bradstreet, 10/88

Table 1.b

LISTED SIC's & CORRESPONDING INDUSTRY AREA

SIC	INDUSTRY AREA
13	Oil & Gas Extraction
15-17	Construction
20	Food & Allied Products
27	Printing & Publishing
28	Chemicals & Allied Products
30	Rubber & Plastic Products
34	Fabricated Metal Products
35	Nonelectrical Machinery
36	Electrical & Electronic Machinery
37	Transportation Equipment
38	Photo, Medical & Optical Instruments
45	Air Transportation
48	Communication
50-51	Distribution & Wholesale Trade
54	Food Stores
56	Apparel & Accessory Stores
60	Banking
63-64	Insurance
73	Business Services
89	Engineering & Other Services

Likewise, the present effort focuses on one key aspect of the merger and acquisition environment. This is what is referred to as a merger and acquisition "event". An event is a classification of a filing by the subject matter. For example, a "leveraged buyout" is considered an event. Likewise, a "tender offer" is an event under this classification. It is assumed that the occurence of certain events is more likely be a good measure of takeover activity than the occurence of others. The present work focused on the frequency of occurence for events assumed to be most closely linked to takeover activity.

Comprehensive listings of all events in all SIC's were obtained for 1988 SEC filings (through November 5) in Massachusetts. A categorization by SIC provided a view of the frequency with which certain events appeared to be occuring within each industrial sector. Grouped by event, these data enabled a closer look at the industries which appeared to be seeing the greatest amount of activity within each type of event.

Table 2 examines the distribution of all events within select SIC's (previously identified) for Massachusetts and the Nation. Likewise, Table 3 examines the distribution of "select" events among all SIC's. (Table 3.b is a listing of event codes and corresponding event names for these "select" events.)

In Lists 1 & 2, each line represents a separate filing. Where there appear to be duplicates, these may instead be comparable filings undertaken by different "Acquirers" or filed at separate times. Each record actually consists of more than 30 "fields", only some of which are identified here. In order to differentiate what appear on the surface to be duplicates, the full content of the original data files would have to be examined more closely.

Events selected on the basis of an assumed linkage to takeover activity are identified and examined in List 1. This list displays individual events from filings in Massachusetts for each year, 1985 through 1988. These are indexed by the company represented as the target of the event. It is of interest to note that the number of events to date in 1988 is over twice the number in each of the previous three years.

The listings obtained also revealed the fact that there have been 12,025 aggregate M&A filings nationwide to date in 1988 (November 5). Of these 640 have been in Massachusetts. Of the 640 Massachusetts filings, 99 are filings where the "country of the reporting person" is not the U.S.A. Over 15% of all filings in Massachusetts to date in 1988 have, therefore, been made by persons or businesses resident outside of the United States. List 2 displays these filings grouped by industry.

Table 2

DISTRIBUTION OF M&A FILINGS
FOR SELECT SIC's
(1985 - 10/4/88)

SIC	NATIONAL	MASSACHUSETTS	(A)	(B)
28	1143	16	1.1	1.4
30	560	48	3.4	8.6
35	1399	32	2.3	2.3
36	3026	315	22.4	10.4
38	1359	156	11.1	11.5
50-51	1195	11	.8	.9
54	645	46	3.3	6.8
56	143	37	2.6	25.9
60	1068	18	1.3	1.7
63-64	879	24	1.7	2.7
73	2149	82	5.8	3.8

===

Total Massachusetts filings for all SIC's = 1,406 = X

A = percentage of "X" represented by each SIC for "Massachusetts"

B = "Massachusetts" as a percentage of "national" for each listed SIC

Data Source: "M&A Filings", Charles E. Simon & Company, 10/88

Table 3

DISTRIBUTION OF M&A FILINGS
BY SELECT EVENT CODES
(1985 - 10/4/88)

CODE	NATIONAL	MASSACHUSETTS	(A)	(B)
130	130	5	3.8	.4
110	1103	46	4.2	3.3
180	33	0	0	0
62	129	7	5.4	.5
60	240	11	4.6	.8
174	63	0	0	0
127	118	1	.8	0
52	198	3	1.5	.2
49	143	5	3.5	.4
55	80	7	8.8	.5
161	21	0	0	0
26	381	22	5.8	1.6
73	577	11	1.9	.8
12	2142	87	4.1	6.2
47	140	0	0	0
36	154	14	9.1	1.0
35	187	8	4.3	.6
82	40	0	0	0
39	229	7	3.1	.5
51	4039	176	4.4	12.5
165	503	23	4.6	1.6
46	27	0	0	0
53	54	3	5.6	.2

Total Massachusetts filings for all Event Codes = 1,406 = X

A = "Massachusetts" as a percentage of "national" for each listed Event Code

B = percentage of "X" represented by each Event Code for "Massachusetts"

Data Source: "M&A Filings", Charles E. Simon & Company, 10/88

Table 3.b

M&A EVENT CODES LISTED & CORRESPONDING EVENT NAMES

CODE	EVENT NAME
130	AMMEND CHARTER/BY-LAWS (OF ISSUER)
110	CONTROL SOUGHT
180	DEFENSE MOVE
62	DIVESTITURE
60	EMPLOYEE STOCK OWNERSHIP PLAN
174	FIRST STEP OF TWO STEP OFFER
127	FOREIGN CO.
52	FRIENDLY
49	GOING-PRIVATE TRANSACTION
55	GOLDEN PARACHUTE
161	GREENMAIL
26	HOSTILE
73	LEVERAGED BUYOUT
12	MERGER AGREEMENT
47	PARTIAL TENDER OFFER
36	POISON PILL
35	PROXY FIGHT
82	REINCORPORATION
39	REJECTION OF OFFER
51	TENDER OFFER
165	TRANSFER OF CONTROL OF ISSUER
46	TWO-TIER OFFER
53	WHITE KNIGHT

Select* M&A Filings for Massachusetts - 1985

Target Company	SIC Code	Event Name	Acquirer
CABOT CORP	1311	SELF TENDER (41)	Cabot Corp
HCW INC	1311	MERGER AGREEMENT (12)	Agar Frank M
HCW INC	1311	TENDER OFFER (51)	SAC Inc
HCW INC	1311	TENDER OFFER (51)	HCW Inc
HCW INC	1311	APPROVAL OF OFFER BY MANAGEMENT (172)	HCW Inc
HCW INC	1311	TENDER OFFER (51)	Southmark Corp.
HCW INC	1311	TENDER OFFER (51)	Southmark Corp.
HERMETITE CORP	3679	TENDER OFFER (51)	HCC Acquisition Corp
HERMETITE CORP	3679	TENDER OFFER (51)	HCC Acquisition Corp
HERMETITE CORP	3679	TENDER OFFER (51)	HCC Acquisition Corp
HERMETITE CORP	3679	TENDER OFFER (51)	HCC Acquisition Corp
HERMETITE CORP	3679	EXTENSION OF EXPIRATION DATE OF TENDER	HCC Acquisition Corp
HERMETITE CORP	3679	PROPOSED MERGER (57)	HCC Industries
IDLE WILD FOODS INC	2010	OPTION AGREEMENT (5)	Jacobson M Howard
LFE CORPORATION	3823	MERGER AGREEMENT (12)	Mark IV Industries
LFE CORPORATION	3823	EMPLOYEE STOCK OWNERSHIP PLAN (60)	LFE Corp
LFE CORPORATION	3823	EMPLOYEE STOCK OWNERSHIP PLAN (60)	NA
LFE CORPORATION	3823	TENDER OFFER (51)	Mark IV Industries I
LFE CORPORATION	3823	TENDER OFFER (51)	Mark IV Acquisition
LFE CORPORATION	3823	TENDER OFFER (51)	LFE Corp
LFE CORPORATION	3823	MERGER AGREEMENT (12)	LFE corp
LFE CORPORATION	3823	TENDER OFFER (51)	LFE Corp
LFE CORPORATION	3823	TENDER OFFER (51)	Mark IV Industries I
LIFE OF BOSTON INSUR	6311	CONTROL SOUGHT (110)	Loyal American Life
WALBAR INC	3720	TENDER OFFER (51)	CII Boston Corp
WALBAR INC	3720	TENDER OFFER (51)	CII Boston Corp
WALBAR INC	3720	TENDER OFFER (51)	CII Boston Corp
WALBAR INC	3720	TENDER OFFER (51)	CII Boston Corp
WALBAR INC	3720	TENDER OFFER (51)	NA
WALBAR INC	3720	TENDER OFFER (51)	CII Boston Corp
WALBAR INC	3720	TENDER OFFER (51)	CII Boston Corp
WALBAR INC	3720	TENDER OFFER (51)	CII Boston Corp
WALBAR INC	3720	TENDER OFFER (51)	CII Boston Corp
WALBAR INC	3720	TENDER OFFER (51)	CII Boston Corp
WALBAR INC	3720	TENDER OFFER (51)	CII Boston Corp.
WALBAR INC	3720	TENDER OFFER (51)	CII Boston Corp

Select* M&A Filings for Massachusetts - 1986

Target Company	SIC Code	Event Name	Acquirer
BAIRD CORP	3830	PROXY FIGHT (35)	Foster Howard
CADEC SYSTEMS INC	3683	PROPOSED MERGER (57)	Cummins Engine Co In
CADEC SYSTEMS INC	3683	PROPOSED MERGER (57)	Cummins Engine Co In
CML GROUP INC	5600	INVESTMENT (15)	Pauls Edward A
CONVERSE INC	3000	EMPLOYMENT AGREEMENT (155)	Interco
CONVERSE INC	3000	TENDER OFFER (51)	Interco Inc
CONVERSE INC	3000	CONTROL SOUGHT (110)	Interco Inc
CONVERSE INC	3000	TERMINATION (76)	Interco Inc
CONVERSE INC	3000	TENDER OFFER (51)	Interco Inc
CONVERSE INC	3000	TENDER OFFER (51)	Interco Inc
CONVERSE INC	3000	CONTROL SOUGHT (110)	Interco Inc
CONVERSE INC	3000	TERMINATION (76)	Interco Inc
CONVERSE INC	3000	TENDER OFFER (51)	Interco Inc
CONVERSE INC	3000	CONTROL SOUGHT (110)	Interco Inc
DASA CORP	3661	OPTION AGREEMENT (5)	Cherrill William W
DELMED INC	3841	TENDER OFFER (51)	Delmed Inc
DELMED INC	3841	TENDER OFFER (51)	Delmed Inc
EALING CORP	3830	MERGER AGREEMENT (12)	Bonsal David S
EALING CORP	3830	PROPOSED MERGER (57)	Bonsal David S
EALING CORP	3830	PROPOSED MERGER (57)	Bonsal David S
ELECTRONICS CORP AME	3622	TENDER OFFER (51)	Nelcoa Inc
ELECTRONICS CORP AME	3622	TENDER OFFER (51)	Nelcoa Inc
ELECTRONICS CORP AME	3622	APPROVAL OF OFFER BY MANAGEMENT (172)	Nelcoa, Inc.
ELECTRONICS CORP AME	3622	TENDER OFFER (51)	Rockwell Internation
ELECTRONICS CORP AME	3622	TENDER OFFER (51)	Rockwell Internation
ELECTRONICS CORP AME	3622	PROPOSED EXTRAORDINARY CORPOPORATE TRA	Metcalf Arthur G
IDLE WILD FOODS INC	2010	MERGER AGREEMENT (12)	Jacobson M Howard
IDLE WILD FOODS INC	2010	OPTION AGREEMENT (5)	Jacobson M Howard
IDLE WILD FOODS INC	2010	MERGER AGREEMENT (12)	Union Acquisition Co
MONARCH CAPITAL CORP	6312	TENDER OFFER (51)	Monarch Capital Corp
PROGRAMS & ANALYSIS	7374	CONTROL SOUGHT (110)	Programs & Analysis
PROGRAMS & ANALYSIS	7374	DISTRIBUTION (85)	Brighton Paul J
STANHOME INC	2841	TENDER OFFER (51)	Stanhome Inc

Select* M&A Filings for Massachusetts - 1987

Target Company	SIC Code	Event Name	Acquirer
ADAMS RUSSELL ELECTR	3679	DISCUSSION WITH MANAGEMENT (145)	Continental Cablevis
AMERICAN CABLESYSTEM	4899	HART-SCOTT-RODINO ANTITRUST ACT (100)	Continental Cablevis
BAIRD CORP	3830	TENDER OFFER (51)	NA
BAIRD CORP	3830	TENDER OFFER (51)	Imo Delaval Inc
BAIRD CORP	3830	TENDER OFFER (51)	Imo Delaval Inc
BAIRD CORP	3830	TENDER OFFER (51)	IMO Delaval Inc
BAIRD CORP	3830	TENDER OFFER (51)	IMO Delaval Inc
BAIRD CORP	3830	ARBITRAGE ACTIVITIES (54)	Salomon Brothers Inc
BAIRD CORP	3830	TENDER OFFER (51)	NA
BAIRD CORP	3830	OPTION AGREEMENT (5)	Imo Delavel Inc
BAIRD CORP	3830	OPTION AGREEMENT (5)	Imo Delavel Inc
BAIRD CORP	3830	APPROVAL OF OFFER BY MANAGEMENT (172)	BC Acquisition Corp.
COMPUTER IDENTICS CO	3685	PROPOSED CHANGES IN BOARD OF DIRECTORS	Fleming Eberstadt In
COMPUTERVISION CORP	3686	CASH OFFER (128)	Provision Holdings I
DATAMARINE INTERNATI	3662	PROXY FIGHT (35)	Brown Damon Peter
HIGH VOLTAGE ENGINEE	3679	CONTROL SOUGHT (110)	Hyde Park Partners L
IONICS INC	3550	DISCUSSION WITH MANAGEMENT (145)	Cenith Partners LP
JONES & VINING INC	3079	GOING-PRIVATE TRANSACTION (49)	Jones & Vining Inc
JONES & VINING INC	3079	SELF TENDER (41)	Jones & Vining Inc
JONES & VINING INC	3079	SELF TENDER (41)	Jones & Vining Inc
JONES & VINING INC	3079	TENDER OFFER (51)	NA
MORSE SHOE INC	5661	TENDER OFFER (51)	NA
MORSE SHOE INC	5661	TENDER OFFER (51)	MOACQ Corp
MORSE SHOE INC	5661	EXTENSION OF EXPIRATION DATE OF TENDER	NA
MORSE SHOE INC	5661	LITIGATION (29)	MOACQ Corp
MORSE SHOE INC	5661	EXTENSION OF EXPIRATION DATE OF TENDER	Moacq Corp
MORSE SHOE INC	5661	TENDER OFFER (51)	NA
MORSE SHOE INC	5661	APPROVAL OF OFFER BY MANAGEMENT (172)	Moacq Corp
MORSE SHOE INC	5661	TENDER OFFER (51)	Moacq Corp
MORSE SHOE INC	5661	TENDER OFFER (51)	Moacq Corp
MORSE SHOE INC	5661	PROPOSED EXTRAORDINARY CORPORATE TRANS	Plaza Securities Co
MORSE SHOE INC	5661	LETTER AGREEMENT (61)	Plaza Securities Inc
MORSE SHOE INC	5661	CONTROL SOUGHT (110)	Plaza Securities Co
SHAW'S SUPERMARKETS	5411	LIMITED PARTNERSHIP (72)	Cheyne Investments I
SHAW'S SUPERMARKETS	5411	LIMITED PARTNERSHIP (72)	Cheyne Investments I
SHAW'S SUPERMARKETS	5411	LIMITED PARTNERSHIP (72)	Cheyne Investments I
SHAW'S SUPERMARKETS	5411	LIMITED PARTNERSHIP (72)	Cheyne Investments I
SHAW'S SUPERMARKETS	5411	TENDER OFFER (51)	NA
SHAWS SUPERMARKETS I	5411	CONTROL SOUGHT (110)	Cheyne Investments I
SHAWS SUPERMARKETS I	5411	CONTROL SOUGHT (110)	Cheyne Investments I
SIPPICAN INC	3829	CASH OFFER (128)	PLC Acquisition Corp
SIPPICAN INC	3829	CASH OFFER (128)	PLC Acquisition Corp
SIPPICAN INC	3829	MERGER AGREEMENT (12)	NA

Select* M&A Filings for Massachusetts - 1988

Target Company	SIC Code	Event Name	Acquirer
ADAMS RUSSELL INC	3679	MERGER AGREEMENT (12)	Cablevision Systems
ADDISON WESLEY PUBLI	2731	TENDER OFFER (51)	AWP Acquisition Inc
ADDISON WESLEY PUBLI	2731	TENDER OFFER (51)	AWP Acquisition Inc
ADDISON WESLEY PUBLI	2731	TENDER OFFER (51)	AWP Acquisition Inc
ARTHUR D LITTLE INC	7392	LEVERAGED BUYOUT (73)	Aruthur D Little Inc
ARTHUR D LITTLE INC	7392	EMPLOYEE STOCK OWNERSHIP PLAN (60)	Arthur D Little Inc
ARTHUR D LITTLE INC	7392	TRUST (83)	Memorial Drive Trust
COMPUGRAPHIC CORP	3861	FOREIGN CO. (R.P.) (127)	AGFA-Gevaert Inc
COMPUGRAPHIC CORP	3861	FOREIGN CO. (R.P.) (127)	Agfa-Gevaert Graphic
COMPUTERVISION CORP	3686	AMENDMENT (TO AGREEMENT/OFFER) (92)	Provision Holdings,
COMPUTERVISION CORP	3686	AMENDMENT (TO AGREEMENT/OFFER) (92)	Provision Holdings I
COMPUTERVISION CORP	3686	TENDER OFFER (51)	NA
COMPUTERVISION CORP	3686	TENDER OFFER (51)	Provision Holdings I
COMPUTERVISION CORP	3686	TENDER OFFER (51)	NA
COMPUTERVISION CORP	3686	TENDER OFFER (51)	Provision Holdings I
COMPUTERVISION CORP	3686	TENDER OFFER (51)	Provision Holdings I
COMPUTERVISION CORP	3686	TENDER OFFER (51)	Provision Holdings I
COMPUTERVISION CORP	3686	TENDER OFFER (51)	Provision Holdings I
COMPUTERVISION CORP	3686	TENDER OFFER (51)	Provision Holdings I
COMPUTERVISION CORP	3686	HOSTILE (26)	Provision Holdings I
DATA ARCHITECTS INC	7379	TENDER OFFER (51)	L Systems Acquisitio
DATA ARCHITECTS INC	7379	TENDER OFFER (51)	L Systems Acquisitio
DATA ARCHITECTS INC	7379	TENDER OFFER (51)	L Systems Acquisitio
DATA ARCHITECTS INC	7379	TENDER OFFER (51)	L Systems Acquisitio
DATA ARCHITECTS INC	7379	CASH OFFER (128)	L Systems Acquisitio
DATA ARCHITECTS INC	7379	CASH OFFER (128)	L Systems Acquisitio
DATA ARCHITECTS INC	7379	APPROVAL OF OFFER BY MANAGEMENT (172)	NA
DATAMARINE INTERNATI	3662	PROPOSED CHANGES IN BOARD OF DIRECTORS	Brown Peter Damon
DISPLAY COMPONENTS I	3679	PROPOSED MERGER (57)	Curry William C
DISPLAY COMPONENTS I	3679	FOREIGN CO. (R.P.) (127)	TDK U S A Corp
ELECTRO POWERPACS CO	3648	TENDER OFFER (51)	Menvier USA Holdings
ELECTRO POWERPACS CO	3648	TENDER OFFER (51)	Menvier USA Holdings
ELECTRO POWERPACS CO	3648	TENDER OFFER (51)	Menvier Swain Holdin
EPSCO INC	3662	APPROVAL OF OFFER BY MANAGEMENT (172)	EP Acquisition Corp
EPSCO INC	3662	FOREIGN CO. (R.P.) (127)	EP Acquisition Corp
EPSCO INC	3662	FOREIGN CO. (R.P.) (127)	EP Acquisition Corp
GCA CORP	3559	PROPOSED MERGER (57)	General Signal Corp
GILLETTE CO	3421	PROPOSED EXTRAORDINARY CORPORATE TRANS	RB Partners
GILLETTE CO	3421	PROXY FIGHT (35)	RB Partners
HIGH VOLTAGE ENGINEE	3679	TENDER OFFER (51)	Natalie Acquisition
HIGH VOLTAGE ENGINEE	3679	AMENDMENT (TO AGREEMENT/OFFER) (92)	Natalie Acquisition
HIGH VOLTAGE ENGINEE	3679	AMENDMENT (TO AGREEMENT/OFFER) (92)	Natalie Acquisition
HIGH VOLTAGE ENGINEE	3679	MERGER AGREEMENT (12)	NA
HIGH VOLTAGE ENGINEE	3679	EXTENSION OF EXPIRATION DATE OF TENDER	Natalie Acquisition
HIGH VOLTAGE ENGINEE	3679	EXTENSION OF EXPIRATION DATE OF TENDER	Natalie Acquisition

1988, continued

Target Company	SIC Code	Event Name	Acquirer
HIGH VOLTAGE ENGINEE	3679	TENDER OFFER (51)	NA
HIGH VOLTAGE ENGINEE	3679	TENDER OFFER (51)	Natalie Acquisition
HIGH VOLTAGE ENGINEE	3679	TENDER OFFER (51)	Natalie Acquisition
HIGH VOLTAGE ENGINEE	3679	REJECTION OF OFFER (39)	Natalie Acquisition
HIGH VOLTAGE ENGINEE	3679	TENDER OFFER (51)	Natalie Acquisition
HIGH VOLTAGE ENGINEE	3679	TENDER OFFER (51)	Natalie Acquisition
HIGH VOLTAGE ENGINEE	3679	TENDER OFFER (51)	NA
HIGH VOLTAGE ENGINEE	3679	AMENDMENT (TO AGREEMENT/OFFER) (92)	Natalie Acquisition
HIGH VOLTAGE ENGINEE	3679	AMENDMENT (TO AGREEMENT/OFFER) (92)	Natalie Acquisition
HIGH VOLTAGE ENGINEE	3679	TENDER OFFER (51)	NA
HIGH VOLTAGE ENGINEE	3679	TENDER OFFER (51)	Natalie Acquisition
HIGH VOLTAGE ENGINEE	3679	TENDER OFFER (51)	Natalie Acquisition
HIGH VOLTAGE ENGINEE	3679	TENDER OFFER (51)	Natalie Acquisition
HIGH VOLTAGE ENGINEE	3679	TENDER OFFER (51)	Natalie Acquisition
HIGH VOLTAGE ENGINEE	3679	REJECTION OF OFFER (39)	Natalie Acquisition
HIGH VOLTAGE ENGINEE	3679	TENDER OFFER (51)	Natalie Acquisition
HIGH VOLTAGE ENGINEE	3679	TENDER OFFER (51)	Natalie Acquisition
HIGH VOLTAGE ENGINEE	3679	POISON PILL (36)	Natalie Acquisition
HIGH VOLTAGE ENGINEE	3679	POISON PILL (36)	Natalie Acquisition
INTREX FINANCIAL SER	6023	BANK HOLDING CO. (R. P.) (112)	Neworld Bancorp Inc
IONICS INC	3559	CONTROL SOUGHT (110)	Cenith Partners LP
LITTLE ARTHUR D INC	7392	TRUST (83)	Arthur D Little Inc
LITTLE ARTHUR D INC	7392	MERGER AGREEMENT (12)	Memorial Drive Trust
LITTLE ARTHUR D INC	7392	EMPLOYEE STOCK OWNERSHIP PLAN (60)	Memorial Drive Trust
ORION RESEARCH INC	3811	TENDER OFFER (51)	Orion Acquisition Co
ORION RESEARCH INC	3811	TENDER OFFER (51)	Orion Acquisition Co
ORION RESEARCH INC	3811	APPROVAL OF OFFER BY MANAGEMENT (172)	Orion Research Inc
ORION RESEARCH INC	3811	MERGER AGREEMENT (12)	Warburg Pincus Capit
ORION RESEARCH INC	3811	MERGER AGREEMENT (12)	Warburg Pincus Capit
ORION RESEARCH INC	3811	PROPOSED EXTRAORDINARY CORPORATE TRANS	Warburg Pincus Capit
ORION RESEARCH INC	3811	PROPOSED CHANGES IN BOARD OF DIRECTORS	Hollander Milton B
PICTURETEL CORP (for	3662	AMEND CHARTER/BY-LAWS (OF ISSUER) (13	Kyocera Corp
POLAROID CORP	3861	EMPLOYEE STOCK OWNERSHIP PLAN (60)	Shamrock Acquisition
POLAROID CORP	3861	EMPLOYEE STOCK OWNERSHIP PLAN (60)	Shamrock Acquisition
POLAROID CORP	3861	EMPLOYEE STOCK OWNERSHIP PLAN (60)	NA
POLAROID CORP	3861	LITIGATION (29)	NA
POLAROID CORP	3861	LIMITED PARTNERSHIP (72)	Shamrock Acquisition
POLAROID CORP	3861	LIMITED PARTNERSHIP (72)	Shamrock Acquisition
POLAROID CORP	3861	HOSTILE (26)	Shamrock Acquisition
POLAROID CORP	3861	HOSTILE (26)	Shamrock Acquisition
POLAROID CORP	3861	REJECTION OF OFFER (39)	Polaroid Corp
POLAROID CORP	3861	TENDER OFFER (51)	Shamrock Acquisition
POLAROID CORP	3861	TENDER OFFER (51)	Shamrock Acquisition
POLAROID CORP	3861	LITIGATION (29)	Shamrock Holdings In
POLAROID CORP	3861	LIMITED PARTNERSHIP (72)	Shamrock Holdings In
STOP & SHOP COMPANIE	5411	MERGER AGREEMENT (12)	NA

1988, continued

Target Company	SIC Code	Event Name	Acquirer
STOP & SHOP COMPANIE	5411	TENDER OFFER (51)	SSC Acquisition Corp
STOP & SHOP COMPANIE	5411	TERMINATION (76)	Jefferson Acquisitio
STOP & SHOP COMPANIE	5411	APPROVAL OF OFFER BY MANAGEMENT (172)	SSC Acquisition Corp
STOP & SHOP COMPANIE	5411	TENDER OFFER (51)	SSC Acquisition Corp
STOP & SHOP COMPANIE	5411	TENDER OFFER (51)	NA
STOP & SHOP COMPANIE	5411	TENDER OFFER (51)	Jefferson Acquisitio
STOP & SHOP COMPANIE	5411	TENDER OFFER (51)	Jefferson Acquisitio
STOP & SHOP COMPANIE	5411	AMENDMENT (TO AGREEMENT/OFFER) (92)	Jefferson Acquisitio
STOP & SHOP COMPANIE	5411	JUNK BOND FINANCING (103)	Jefferson Acquisitio

M&A Filings in Massachusetts Where

Country of The Reporting Person Is Not The U.S.A.

1988 to date (November 5)

SIC Code	Target Company	Event Name
1041	VETA GRANDE COMPANIE	NA
2086	GENERAL CINEMA CORP	FOREIGN CO. (R.P.) (127)
2211	QUAKER FABRIC CORP	NA
2341	WILLIAM CARTER CO	STOCK PURCHASE AGREEMENT (4)
3199	SWANK INC	EMPLOYEE STOCK OWNERSHIP PLAN (60)
3199	SWANK INC	POWER OF ATTORNEY (98)
3199	SWANK INC	RESTRUCTURE (37)
3421	GILLETTE CO	LIMITED PARTNERSHIP (72)
3550	GCA CORP	FOREIGN CO. (R.P.) (127)
3559	GCA CORP	FOREIGN CO. (R.P.) (127)
3559	IONICS INC	FOREIGN CO. (R.P.) (127)
3559	IONICS INC	STOCK PURCHASE AGREEMENT (4)
3559	SYSTEMS ENGINEERING	FOREIGN CO. (R.P.) (127)
3559	SYSTEMS ENGINEERING	FOREIGN CO. (R.P.) (127)
3560	DENNING MOBILE ROBOT	INSURANCE CO. (R. P.) (140)
3622	TECH-OPS SEVCON INC	OFFICER/DIRECTOR (OF ISSUER) (89)
3636	REECE CORP	FOREIGN CO. (R.P.) (127)
3636	REECE CORP	FOREIGN CO. (R.P.) (127)
3648	ELECTRO POWERPACS CO	TENDER OFFER (51)
3648	ELECTRO POWERPACS CO	TENDER OFFER (51)
3648	ELECTRO POWERPACS CO	TENDER OFFER (51)
3661	DASA CORP	NA
3661	DASA CORP	DEBENTURES/NOTES (97)
3662	DATAMARINE INTERNATI	PROPOSED CHANGES IN BOARD OF DIRECTORS
3662	EPSCO INC	TRANSFER OF CONTROL OF ISSUER (165)
3662	EPSCO INC	TRANSFER OF CONTROL OF ISSUER (165)
3662	EPSCO INC	FOREIGN CO. (R.P.) (127)
3662	EPSCO INC	FOREIGN CO. (R.P.) (127)
3662	EPSCO INC	FOREIGN CO. (R.P.) (127)
3662	EPSCO INC	FOREIGN CO. (R.P.) (127)
3662	PICTURETEL CORP (for	AMEND CHARTER/BY-LAWS (OF ISSUER) (13
3662	PICTURETEL CORP (for	LIMITED PARTNERSHIP (72)
3679	DISPLAY COMPONENTS I	TRANSFER OF CONTROL OF ISSUER (165)
3679	DISPLAY COMPONENTS I	FOREIGN CO. (R.P.) (127)
3681	SYMBOLICS INC	INVESTMENT BANKER (R. P.) (122)
3811	ORION RESEARCH INC	LITIGATION (29)
3811	ORION RESEARCH INC	NA
3811	ORION RESEARCH INC	NA
3811	ORION RESEARCH INC	NA
3811	ORION RESEARCH INC	PROPOSED CHANGES IN BOARD OF DIRECTORS
3811	ORION RESEARCH INC	NA

3811	ORION RESEARCH INC	NA
3811	ORION RESEARCH INC	NA
3842	BOUTON CORP	DISTRIBUTION (85)
3861	COMPUGRAPHIC CORP	COMPLETION OF MERGER TRANSACTION (171
3861	COMPUGRAPHIC CORP	FOREIGN CO. (R.P.) (127)
5081	CHANCELLOR CORP	NA
5081	CHANCELLOR CORP	FOREIGN CO. (R.P.) (127)
5081	CHANCELLOR CORP	INTENT TO PURCHASE SHARES (170)
5081	CHANCELLOR CORP	FOREIGN CO. (R.P.) (127)
5081	CHANCELLOR CORP	FOREIGN CO. (R.P.) (127)
5081	CHANCELLOR CORP	FOREIGN CO. (R.P.) (127)
6022	MERCHANTS CAPITAL CO	FOREIGN CO. (R.P.) (127)
6022	U S TRUST CORP	FOREIGN CO. (R.P.) (127)
6023	MASSBANK CORP	BANK HOLDING CO. (ISSUER) (115)
6159	EATON FINANCIAL CORP	LIMITED PARTNERSHIP (72)
6159	EATON FINANCIAL CORP	FOREIGN CO. (R.P.) (127)
6199	CHANCELLOR CORP	COMPLETION OF MERGER TRANSACTION (171
6281	UNITED ASSET MANAGEM	WARRANT AGREEMENT (17)
6281	UNITED ASSET MANAGEM	WARRANT AGREEMENT (17)
6513	BAY FINANCIAL CORP	POWER OF ATTORNEY (98)
6513	BAY FINANCIAL CORP	POWER OF ATTORNEY (98)
6513	BAY FINANCIAL CORP	FOREIGN CO. (R.P.) (127)
6513	BAY FINANCIAL CORP	FOREIGN CO. (R.P.) (127)
6513	BAY FINANCIAL CORP	FOREIGN CO. (R.P.) (127)
6513	BAY FINANCIAL CORP	FOREIGN CO. (R.P.) (127)
6513	BAY FINANCIAL CORP	FOREIGN CO. (R.P.) (127)
6513	BAY FINANCIAL CORP	FOREIGN CO. (R.P.) (127)
6513	BAY FINANCIAL CORP	INTENT TO PURCHASE SHARES (170)
6513	BAY FINANCIAL CORP	INTENT TO PURCHASE SHARES (170)
6513	BAY FINANCIAL CORP	INTENT TO PURCHASE SHARES (170)
6513	BAY FINANCIAL CORP	LETTER AGREEMENT (61)
6513	BAY FINANCIAL CORP	FOREIGN CO. (R.P.) (127)
6513	BAY FINANCIAL CORP	TERMINATION (76)
6513	BAY FINANCIAL CORP	FOREIGN CO. (R.P.) (127)
6513	BAY FINANCIAL CORP	STANDSTILL AGREEMENTS (38)
6513	BAY FINANCIAL CORP	POWER OF ATTORNEY (98)
6513	BAY FINANCIAL CORP	FOREIGN CO. (R.P.) (127)
6513	BAY FINANCIAL CORP	FOREIGN CO. (R.P.) (127)
6513	BAY FINANCIAL CORP	FOREIGN CO. (R.P.) (127)
6531	COPLEY PROPERTIES IN	INVESTMENT ADVISOR (R. P.) (119)
6723	SCUDDER NEW ASIA FUN	BANK (R. P.) (114)
6723	SCUDDER NEW ASIA FUN	BANK (R. P.) (114)
6723	SCUDDER NEW ASIA FUN	NA
6723	SCUDDER NEW ASIA FUN	FOREIGN CO. (R.P.) (127)
6723	SCUDDER NEW ASIA FUN	FOREIGN CO. (R.P.) (127)
6723	SCUDDER NEW ASIA FUN	FOREIGN CO. (R.P.) (127)
6794	VR BUSINESS BROKERS	PROPOSED EXTRAORDINARY CORPORATE TRANS
8091	LIFETIME CORP	INVESTMENT (15)
8091	LIFETIME CORPORATION	FOREIGN CO. (R.P.) (127)
8091	LIFETIME CORPORATION	FOREIGN CO. (R.P.) (127)
8091	LIFETIME CORPORATION	BANK (R. P.) (114)
8091	MEDITRUST	INVESTMENT ADVISOR (R. P.) (119)
NA	BANKWORCESTER CORP	NA
NA	CAMBRIDGE MEDICAL TE	NA

NA	GENETICS INSTITUTE I	INVESTMENT ADVISOR (R. P.) (119)
NA	HOME PORT BANCORP IN	INVESTMENT (15)
NA	QUAKER FABRIC CORP O	GROUP MEMBER FILING INDIVIDUALLY (20)
NA	TRAVELERS REAL ESTAT	TRUST (83)

3. Identification of Key SIC's and Key Events

For the purpose of manageability, subsequent discussion focuses further on the relationship of certain "key" events with "key" SIC's. Interpretation of the resulting data must give full consideration to the ad hoc nature of this effort. It is recommended, therefore, that the reader be guarded in the conclusions that he or she may draw.

An assessment of the initial sets of data provided the context for a closer inspection of their contents. As a result, a handful of "key" elements were selected to serve as the basis of this closer examination. Five M&A events, which appear to have high rates of occurence in Massachusetts, and six SIC's, which appear to have special significance to the Massachusetts economy, were isolated and examined. These are as follows:

<u>Events</u> (event code)

control sought (110)
employee stock ownership plan (60)
hostile (26)
merger agreement (12)
tender offer (51)

<u>SIC's</u>	(description)
30	(rubber & plastic products)
36	(electrical & electronic machinery)
38	(photo, medical & optical instruments)
54	(food stores)
56	(apparel & accessory stores)
73	(business services)

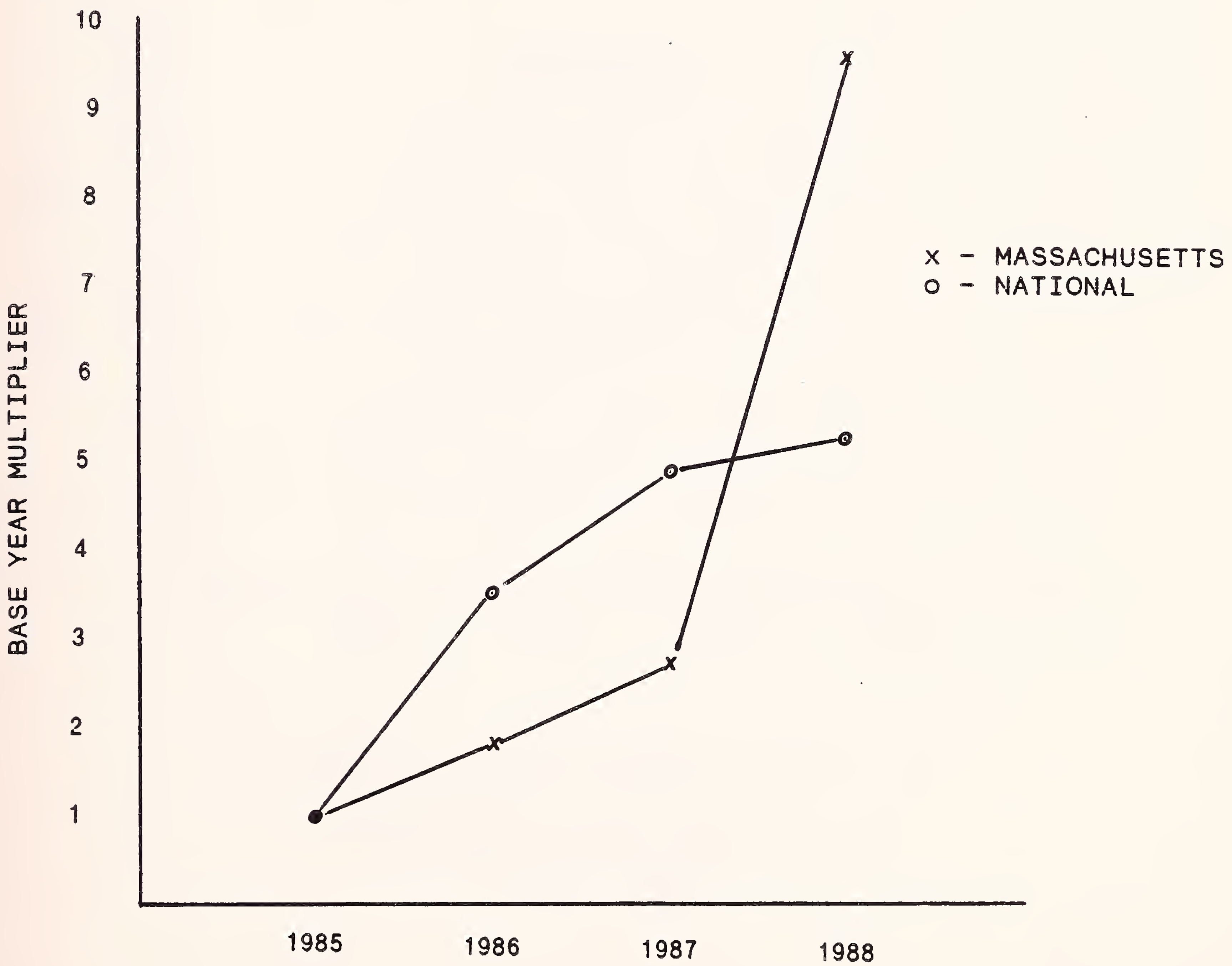
Figure 2 examines the rate of growth in M&A filings for these key events in industries represented by key SIC's. Massachusetts figures are contrasted against national figures. The rate of growth is a factor of the number of filings in the base year (1985). The national rate of growth in these areas (represented by the key SIC's identified above) appears to be "flattening out". By contrast, the rate of growth in these areas for Massachusetts appears to be accelerating. Figures 3.a and 3.b translate the rates of growth into (numerical) frequency of filings for these key areas.

RATE OF GROWTH IN M&A FILINGS

FOR KEY EVENTS IN KEY SIC's*

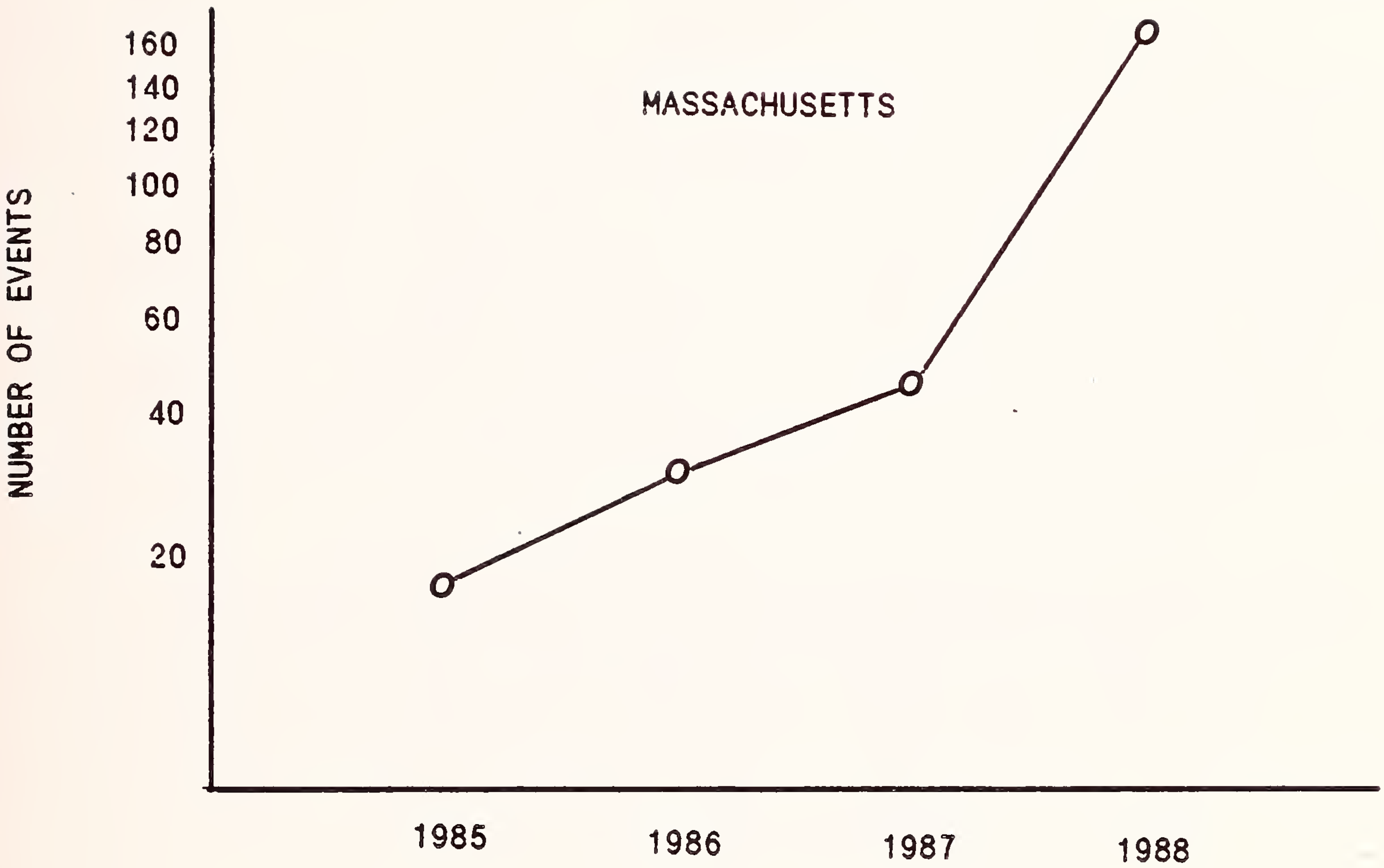
1985 - 1988e

(base year 1985 = 1.0)



efined as events:
- control sought (110)
- employee stock ownership plan (60)
- hostile (26)
- merger agreement (12)
- tender offer (51)

with SIC's:
- 30 (rubber & plastic products)
- 36 (electrical & electronic machinery)
- 38 (photo, medical & optical instruments)
- 54 (food stores)
- 56 (apparel & accessory stores)
- 73 (business services)



FREQUENCY OF FILING EVENTS BY CALENDAR YEAR

FOR COMBINED KEY FILINGS WITH KEY SIC's*

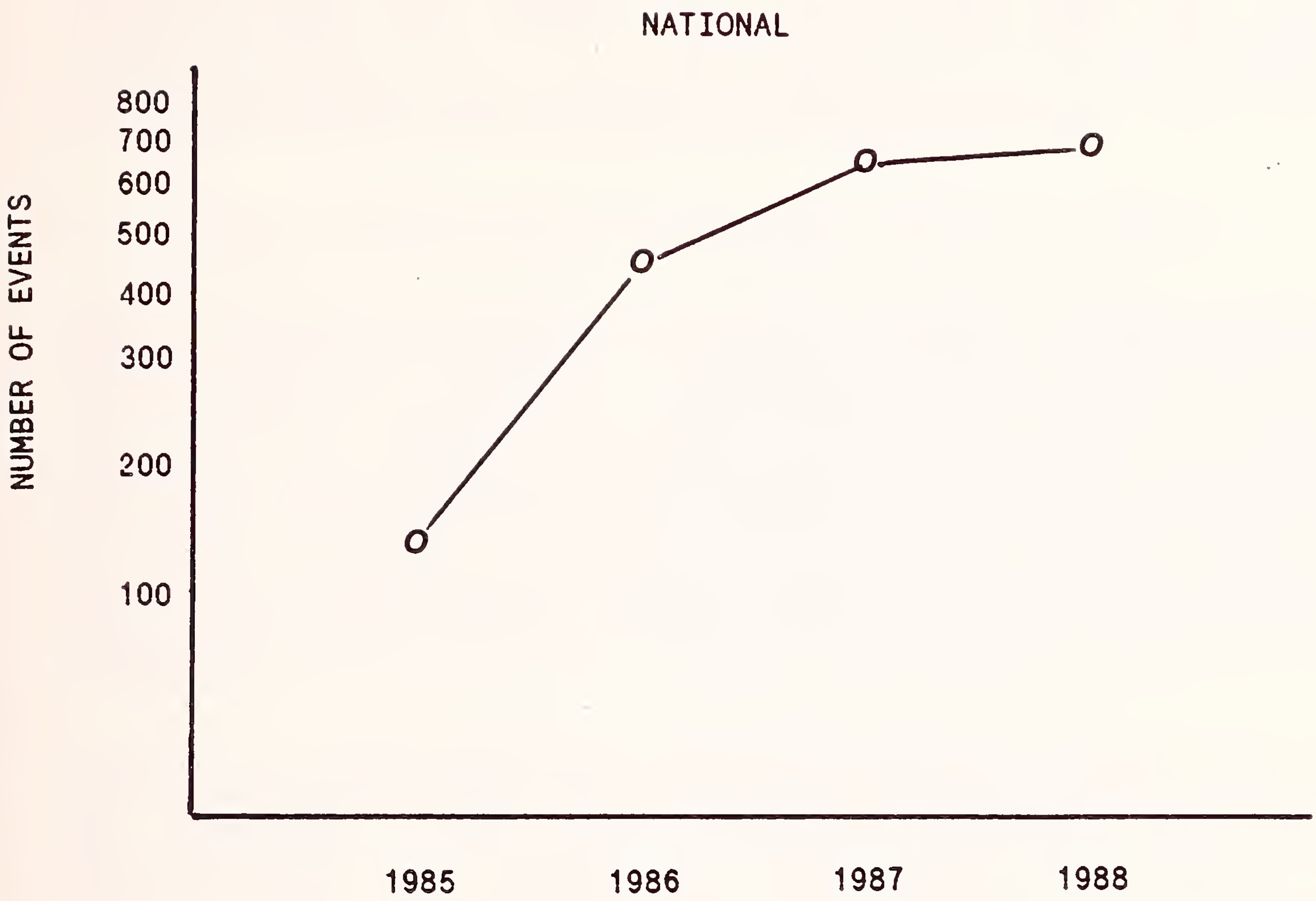
1985 - 1988e

* Events (event code)

control sought (110)
employee stock ownership plan (60)
hostile (26)
merger agreement (12)
tender offer (51)

SIC's	(description)
30	(rubber & plastic products)
36	(electrical & electronic machinery)
38	(photo, medical & optical instruments)
54	(food stores)
56	(apparel & accessory stores)
73	(business services)

figure 3.b



FREQUENCY OF FILING EVENTS BY CALENDAR YEAR

FOR COMBINED KEY FILINGS WITH KEY SIC's

1985 - 1988e

* Events (event code)	SIC's	(description)
control sought (110)	30	(rubber & plastic products)
employee stock ownership plan (60)	36	(electrical & electronic machinery)
hostile (26)	38	(photo, medical & optical instruments)
merger agreement (12)	54	(food stores)
tender offer (51)	56	(apparel & accessory stores)
	73	(business services)

Figure 4 examines the change in the proportion of National M&A filings made in Massachusetts over time. The proportion of all events and all SIC's for the Nation that are represented by Massachusetts filings appears to be growing steadily at approximately one percentage point per year for those years examined. When key SIC's and key events are isolated, however, there appear to be radical shifts in the proportion of the national filings represented by Massachusetts.

4. Closer Examination of Two SIC's and Two Events

In an effort of obtain a glimpse at the underpinnings of what appear to be the radical shifts in filings, identified above, the distribution of filings in Massachusetts by key SIC's and by key events were examined. Comparisons were made based on the frequency of events occuring in each of these categories. The findings are represented in figures 5.a and 5.b respectively. The top two SIC's were 36 (electrical and electronic machinery) and 38 (photo, medical & optical instruments), and the top two events were merger agreements (event code 12) and tender offers (event code 51). These SIC's and events were singled out for even closer inspection.

Figure 6.a represents the combined rate of growth (as a factor of the base year, 1985) for merger agreements and tender offers in the combined 6 key SIC's. Again, it appears that the rate of growth for the nation is flattening out while that of Massachusetts appears to be accelerating. Figures 6.b and 6.c illustrate comparable rates of growth separating merger agreements from tender offers. The trends appear to be reasonably consistent with the combined findings.

Figure 7 examines the proportion of the National filings in these two events which were made in Massachusetts. In both events, the trend appears to have shifted toward an increase in that proportion during 1988.

Figure 8.a represents the combined rate of growth (as a factor of the base year, 1985) for SIC's 36 & 38 for the combined 5 key events. Again, it appears that the rate of growth for the Nation is flattening out. In this instance, it appears that the rate of growth in filings for Massachusetts has remained at virtually zero until 1988. During 1988, it appears that the rate at which filings are being made has increased dramatically. Figures 8.b and 8.c illustrate comparable rates of growth separating SIC 36 from SIC 38. The trends appear to point to the fact the most dramatic shift has been in the accelerating rate of filings in SIC 36 (electrical & electronic machinery).

figure 4

M&A FILINGS

1985 - 1988e

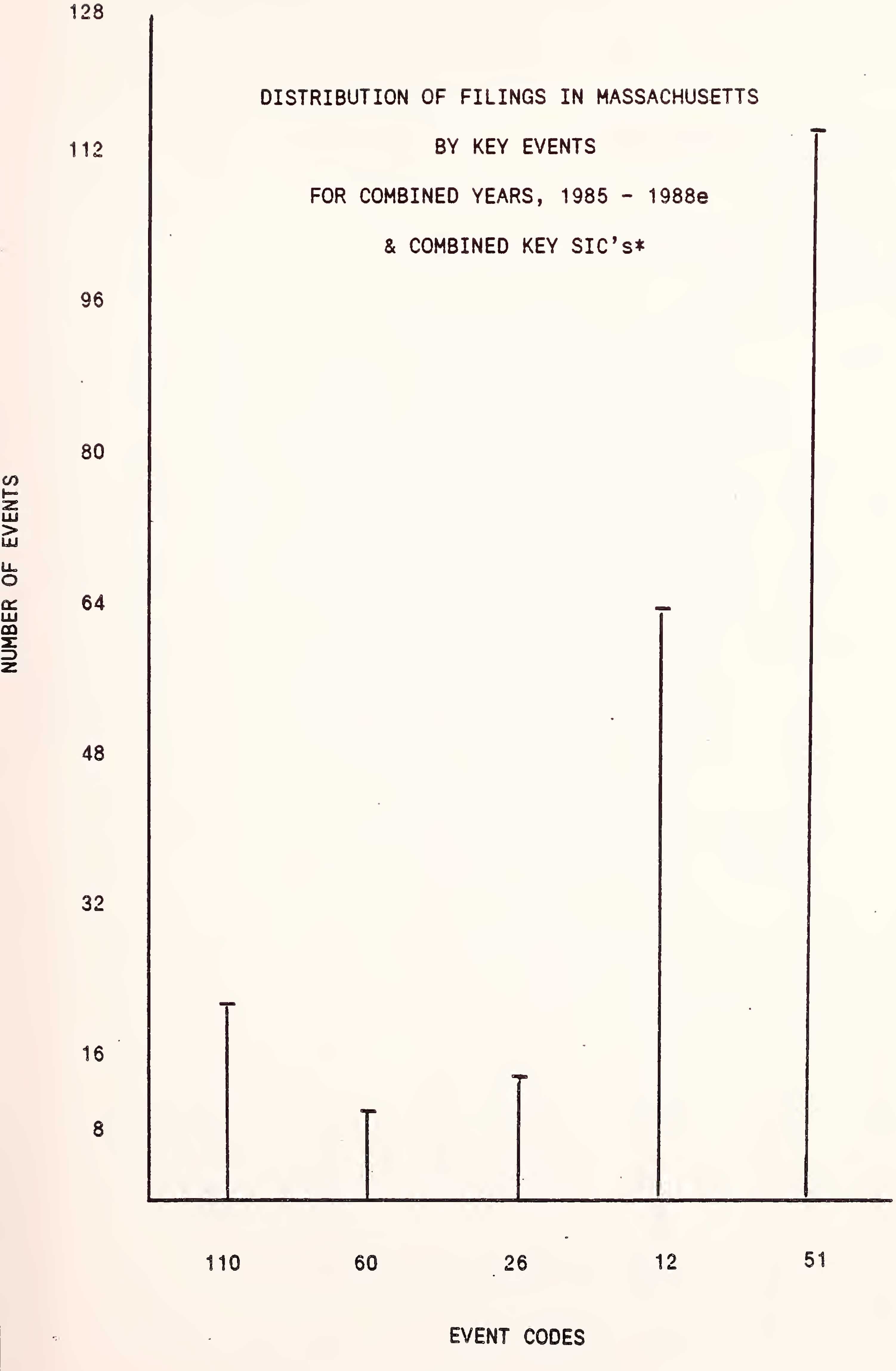
MASSACHUSETTS AS A PERCENTAGE OF NATIONAL

x - ALL EVENTS & ALL SIC's
o - KEY EVENTS & KEY SIC's*

* defined as Event Codes:
110, 60, 26, 12 & 51

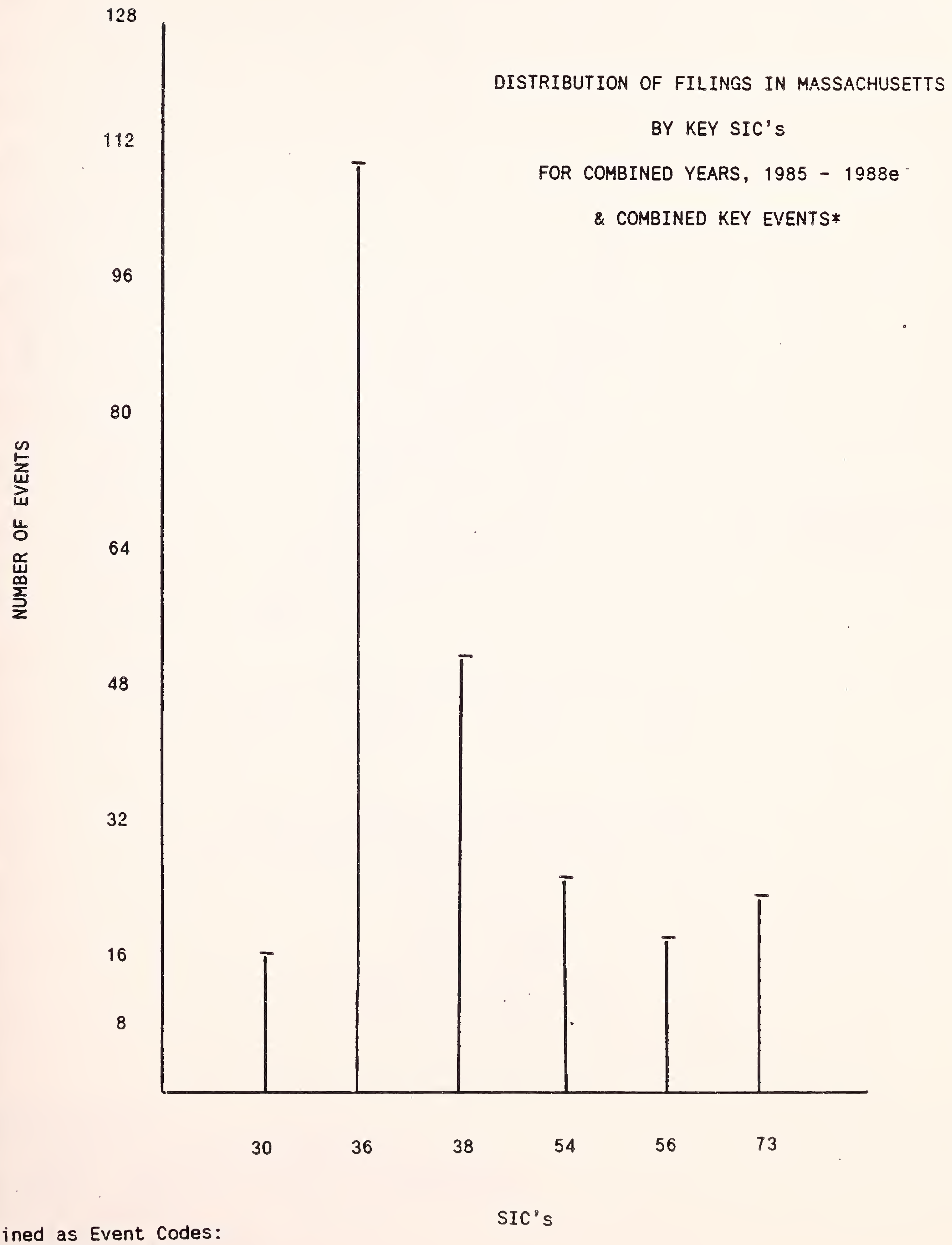
with SIC's:
30, 36, 38, 54, 56 & 73

figure 5.a

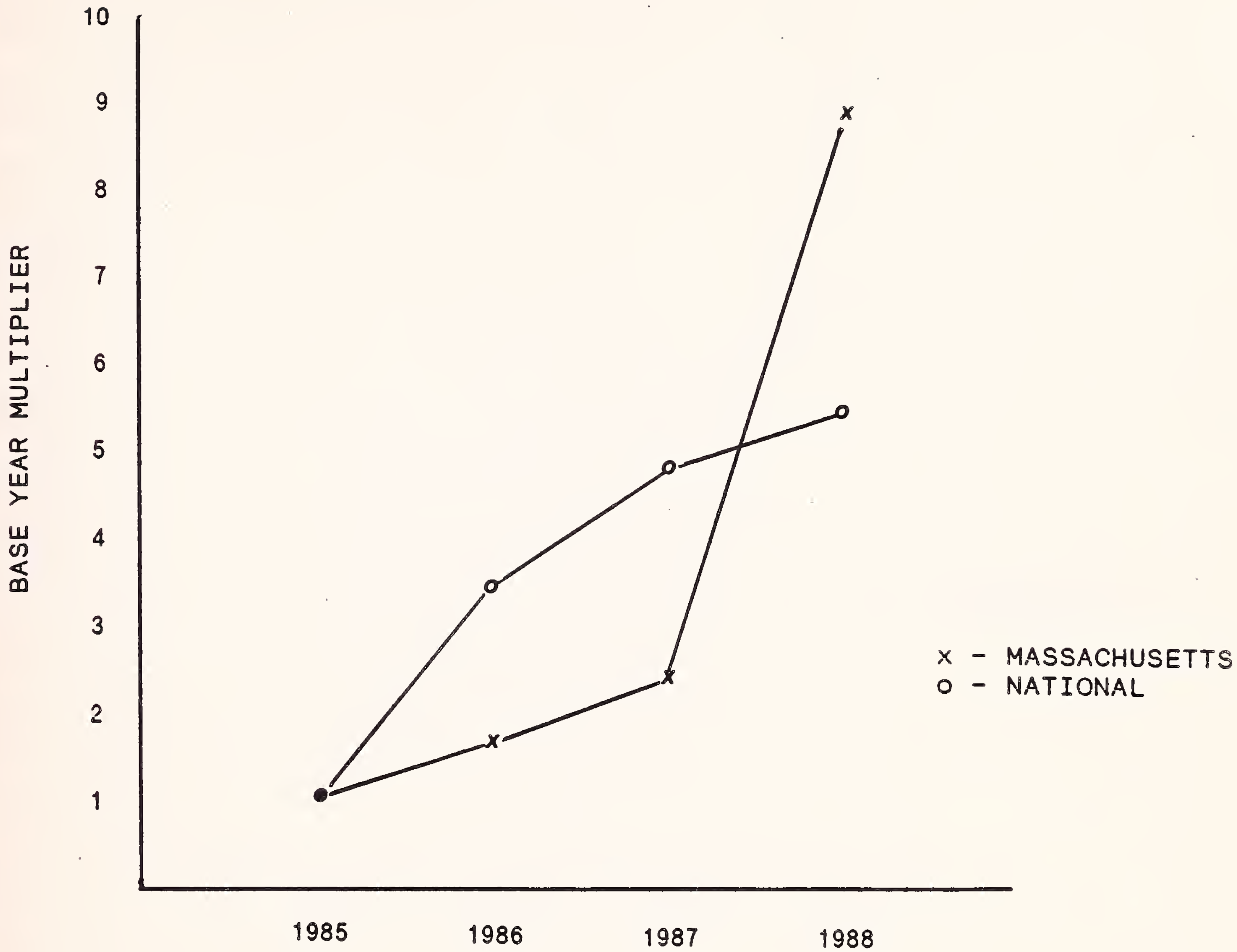


defined as SIC's:
30, 36, 38, 54, 56 & 73

figure 5.b



* defined as Event Codes:
110, 60, 26, 12 & 51



RATE OF GROWTH IN COMBINED FILINGS

FOR "MERGER AGREEMENTS" & "TENDER OFFERS"

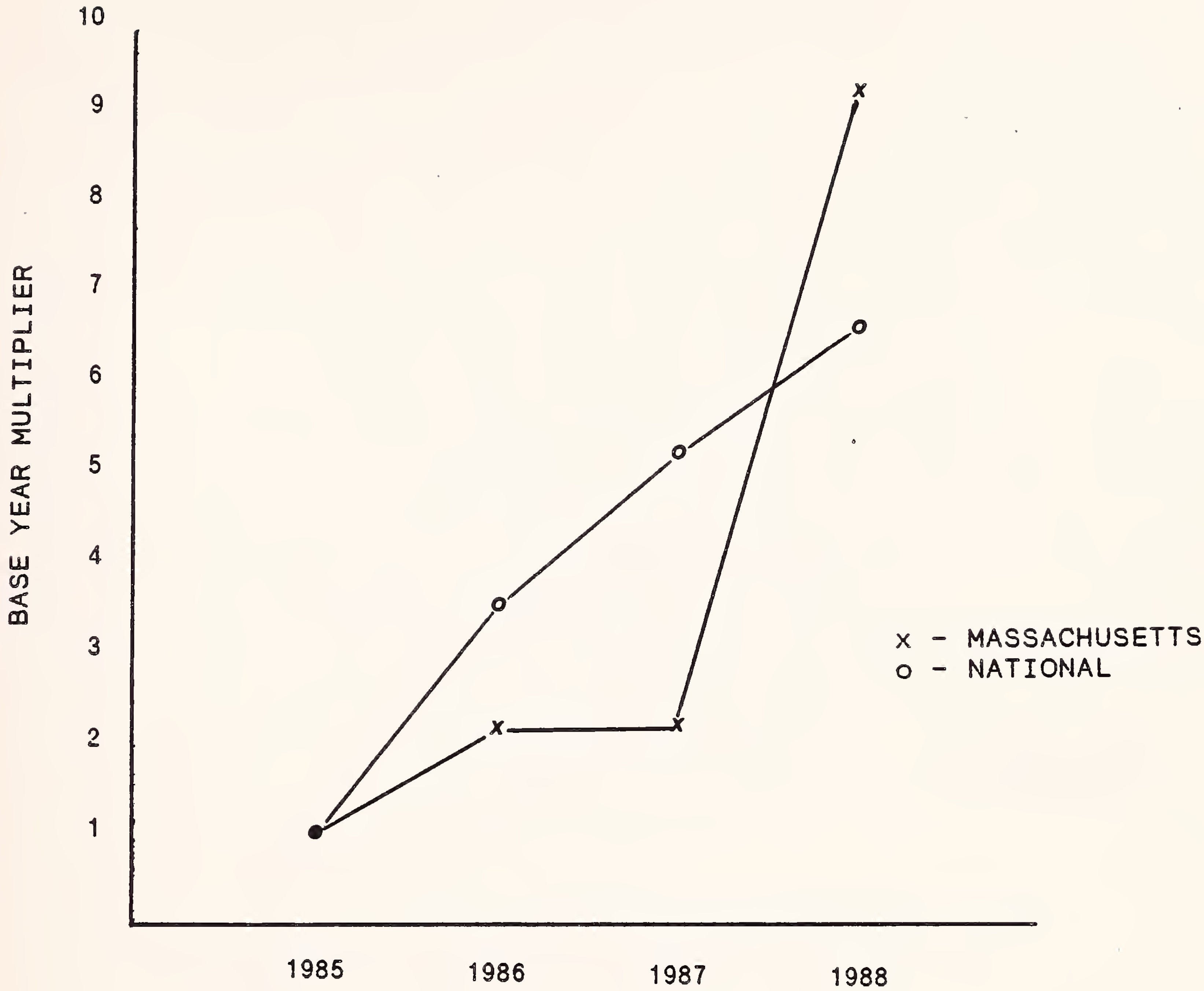
IN KEY SIC's*

1985 - 1988e

(base year 1985 = 1.0)

* defined as SIC's:
- 30 (rubber & plastic products)
- 36 (electrical & electronic machinery)
- 38 (photo, medical & optical instruments)
- 54 (food stores)
- 56 (apparel & accessory stores)
- 73 (business services)

figure 6.b



RATE OF GROWTH IN FILINGS

FOR "MERGER AGREEMENTS"

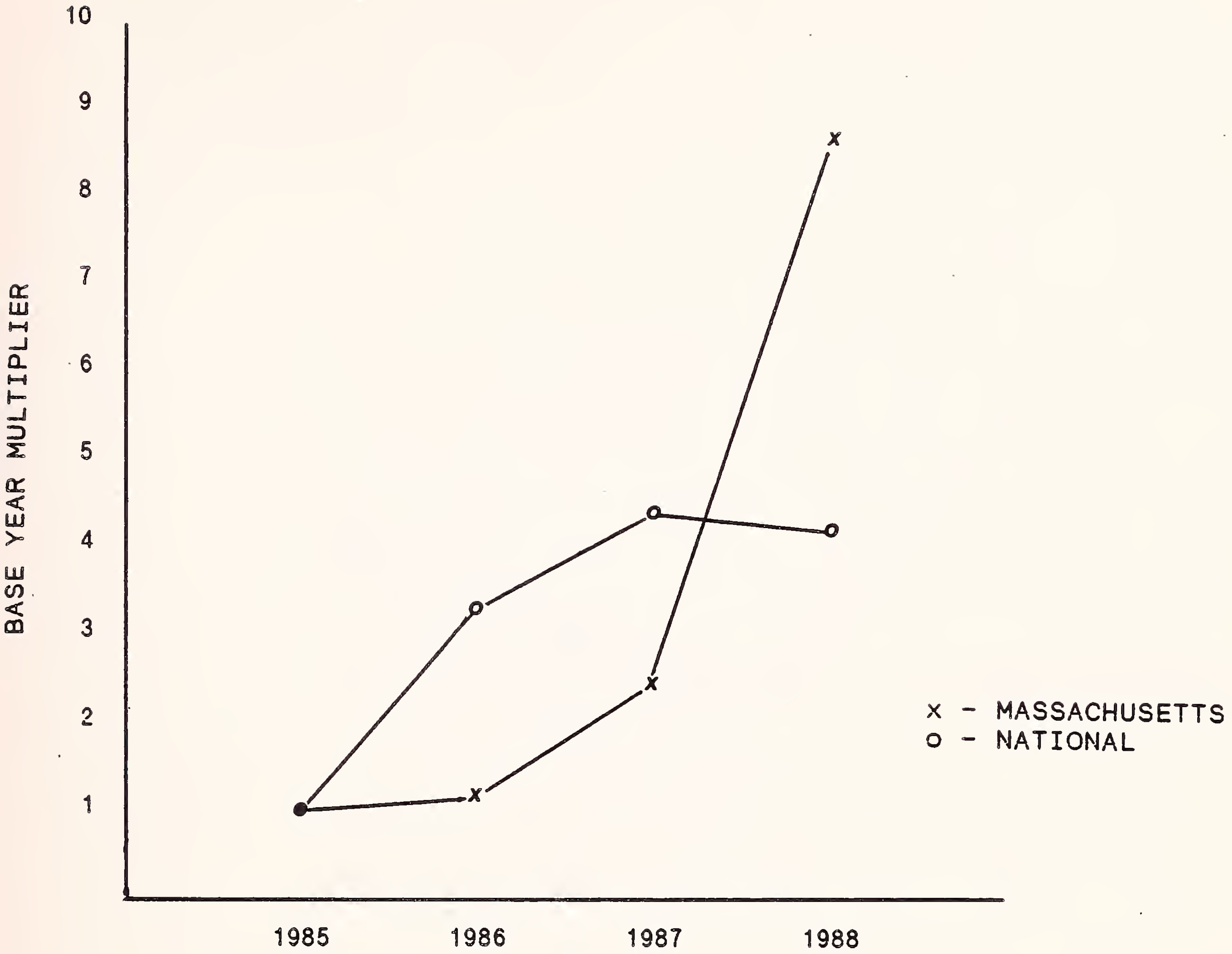
IN KEY SIC's*

1985 - 1988e

(base year 1985 = 1.0)

* defined as SIC's:
- 30 (rubber & plastic products)
- 36 (electrical & electronic machinery)
- 38 (photo, medical & optical instruments)
- 54 (food stores)
- 56 (apparel & accessory stores)
- 73 (business services)

figure 6.c



RATE OF GROWTH IN FILINGS

FOR "TENDER OFFERS"

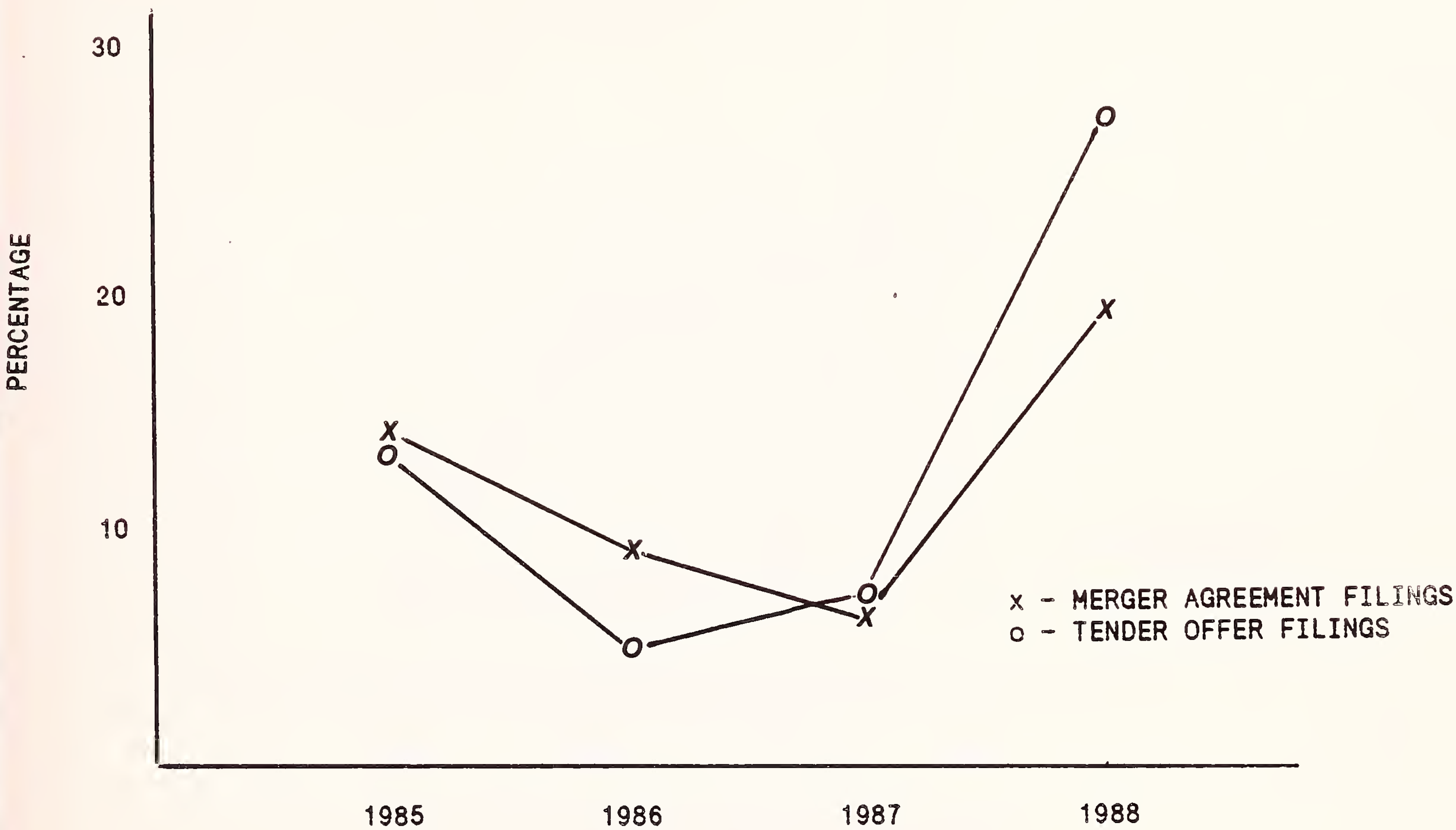
IN KEY SIC's*

1985 - 1988e

(base year 1985 = 1.0)

defined as SIC's:
- 30 (rubber & plastic products)
- 36 (electrical & electronic machinery)
- 38 (photo, medical & optical instruments)
- 54 (food stores)
- 56 (apparel & accessory stores)
- 73 (business services)

figure 7



"MERGER AGREEMENT" FILINGS (12)

& "TENDER OFFER" FILINGS (51)

FOR COMBINED KEY SIC's*

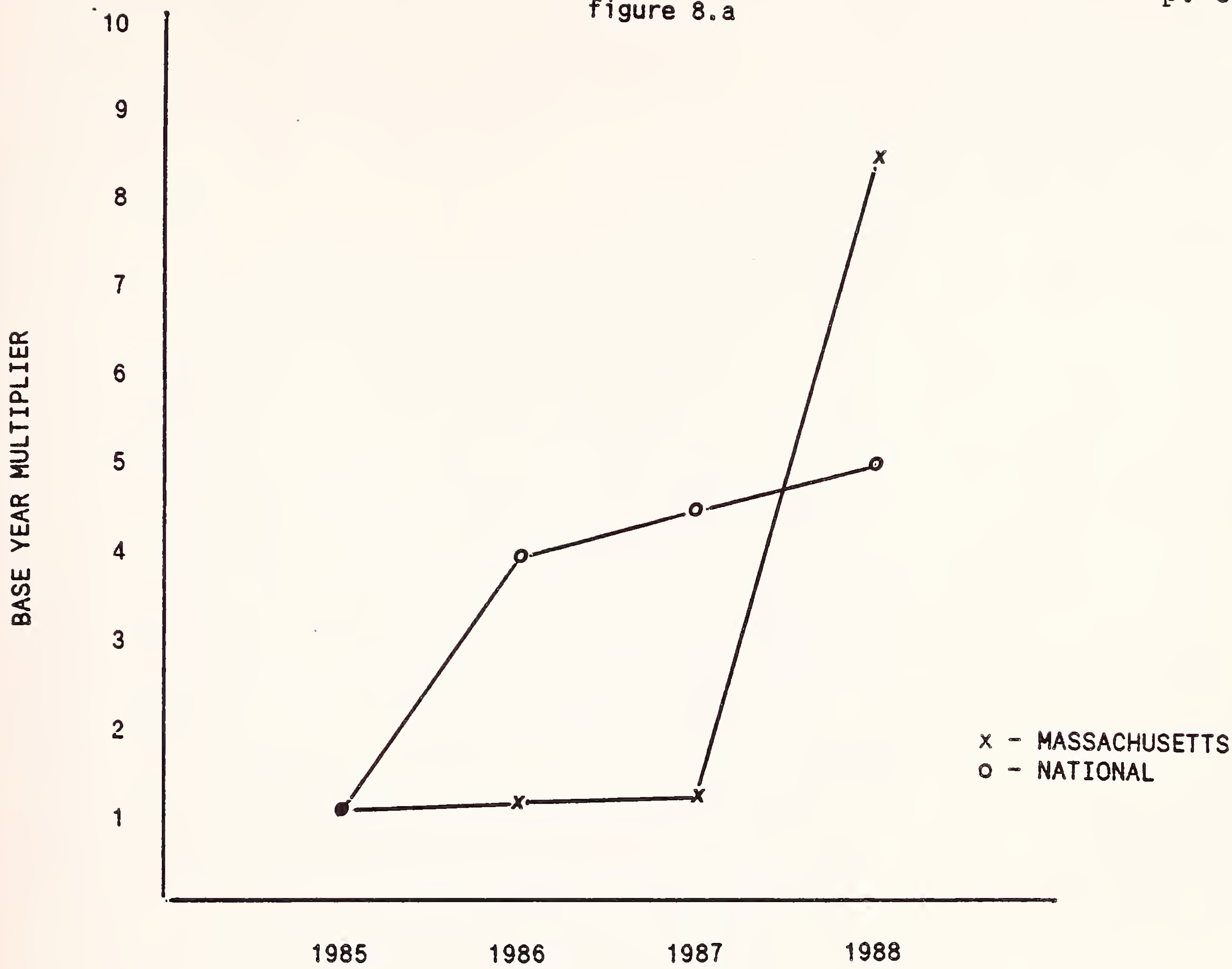
MASSACHUSETTS AS A PERCENTAGE OF NATIONAL

1985 - 1988e

SIC's	(description)
30	(rubber & plastic products)
36	(electrical & electronic machinery)
38	(photo, medical & optical instruments)
54	(food stores)
56	(apparel & accessory stores)
73	(business services)

(see figure 4)

figure 8.a



RATE OF GROWTH IN COMBINED KEY FILINGS*

FOR SIC's 36; "ELECTRICAL & ELECTRONIC MACHINERY"

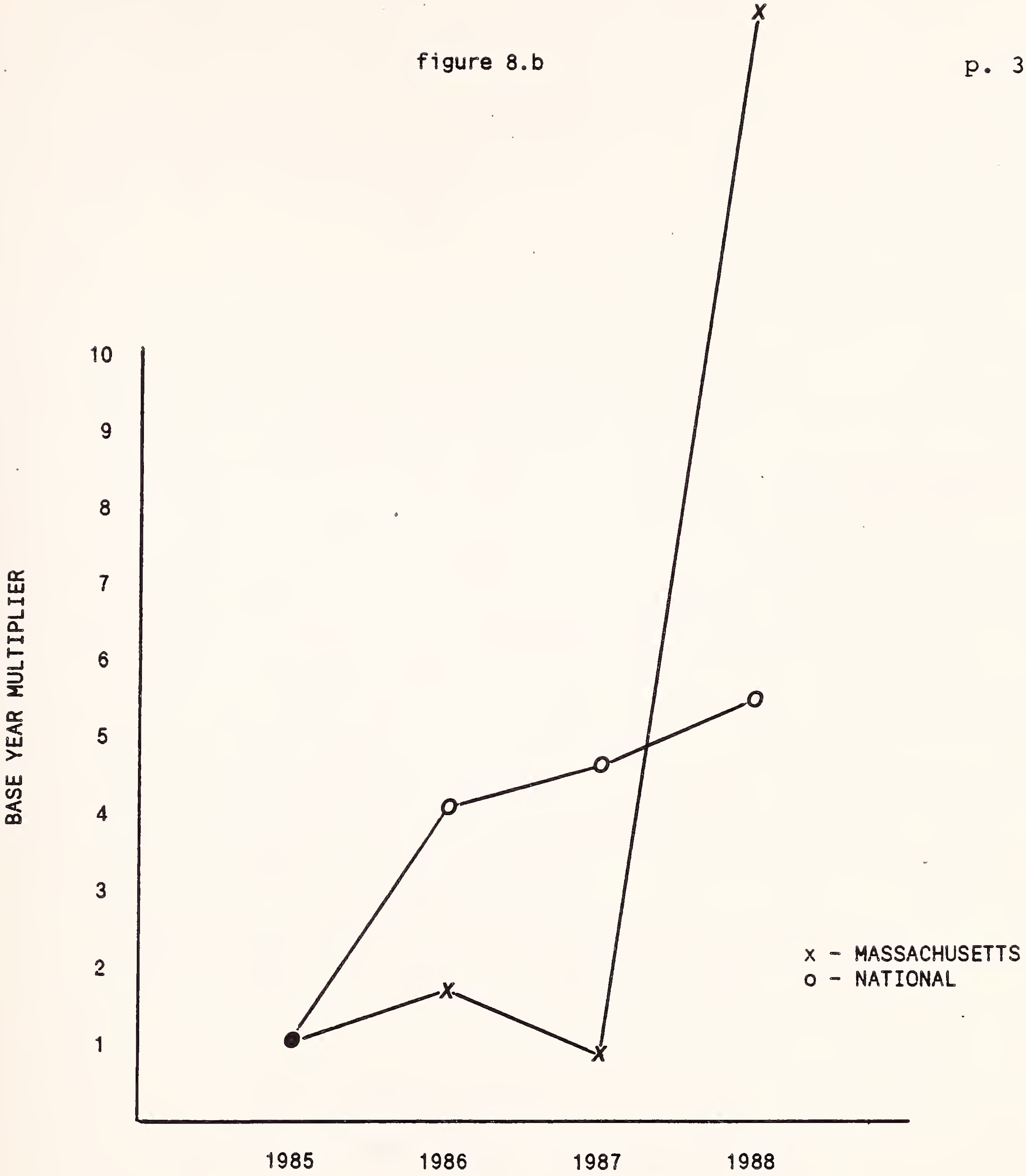
& 38; "PHOTO, MEDICAL & OPTICAL INSTRUMENTS"

1985 - 1988e

(base year 1985 = 1.0)

defined as events:
- control sought (110)
- employee stock ownership plan (60)
- hostile (26)
- merger agreement (12)
- tender offer (51)

figure 8.b



RATE OF GROWTH IN COMBINED KEY FILINGS*

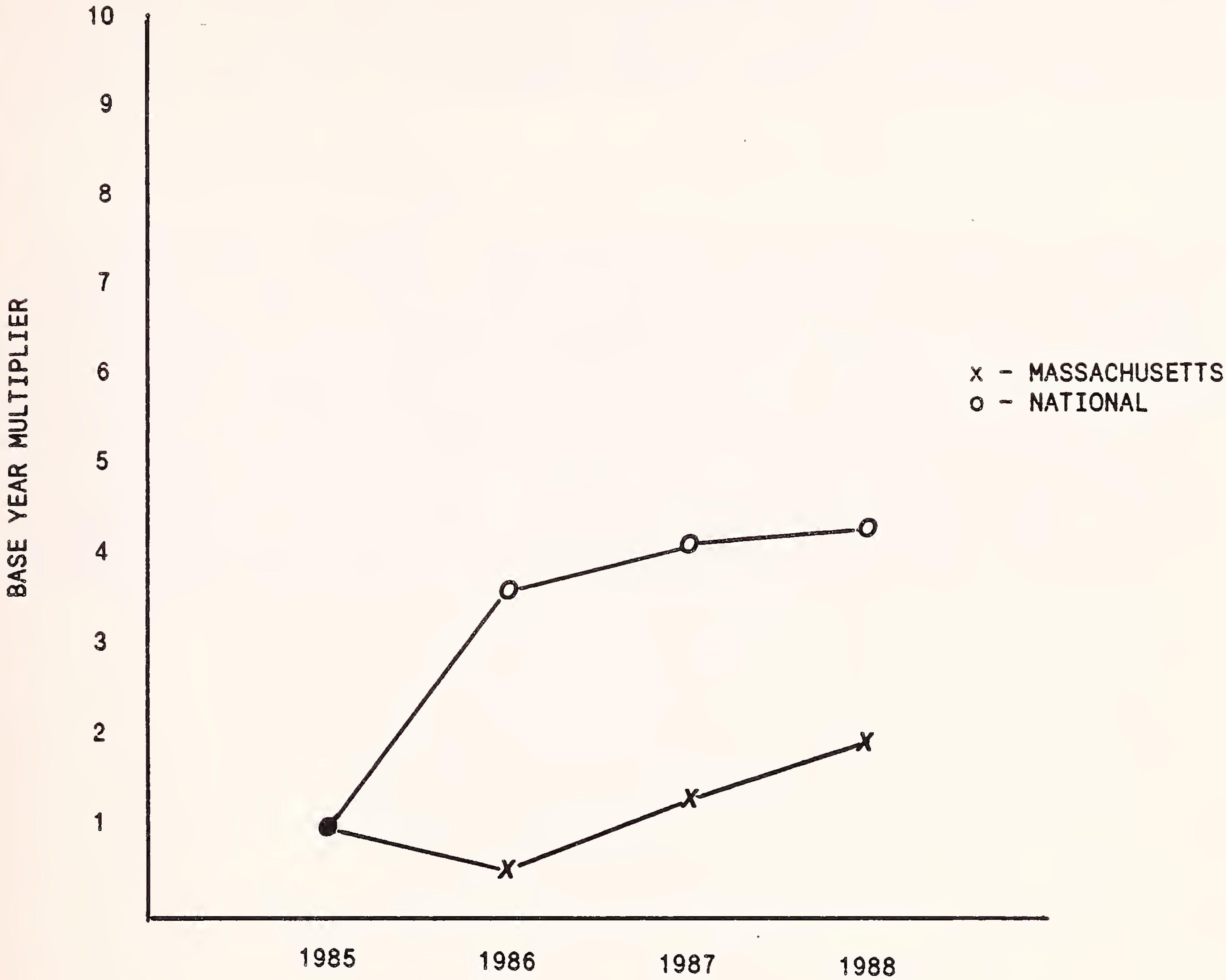
FOR SIC 36; "ELECTRICAL & ELECTRONIC MACHINERY"

1985 - 1988e

(base year 1985 = 1.0)

efined as events:
control sought (110)
employee stock ownership plan (60)
hostile (26)
merger agreement (12)
tender offer (51)

figure 8.c



RATE OF GROWTH IN COMBINED KEY FILINGS*

FOR SIC 38; "PHOTO, MEDICAL & OPTICAL INSTRUMENTS"

1985 - 1988e

(base year 1985 = 1.0)

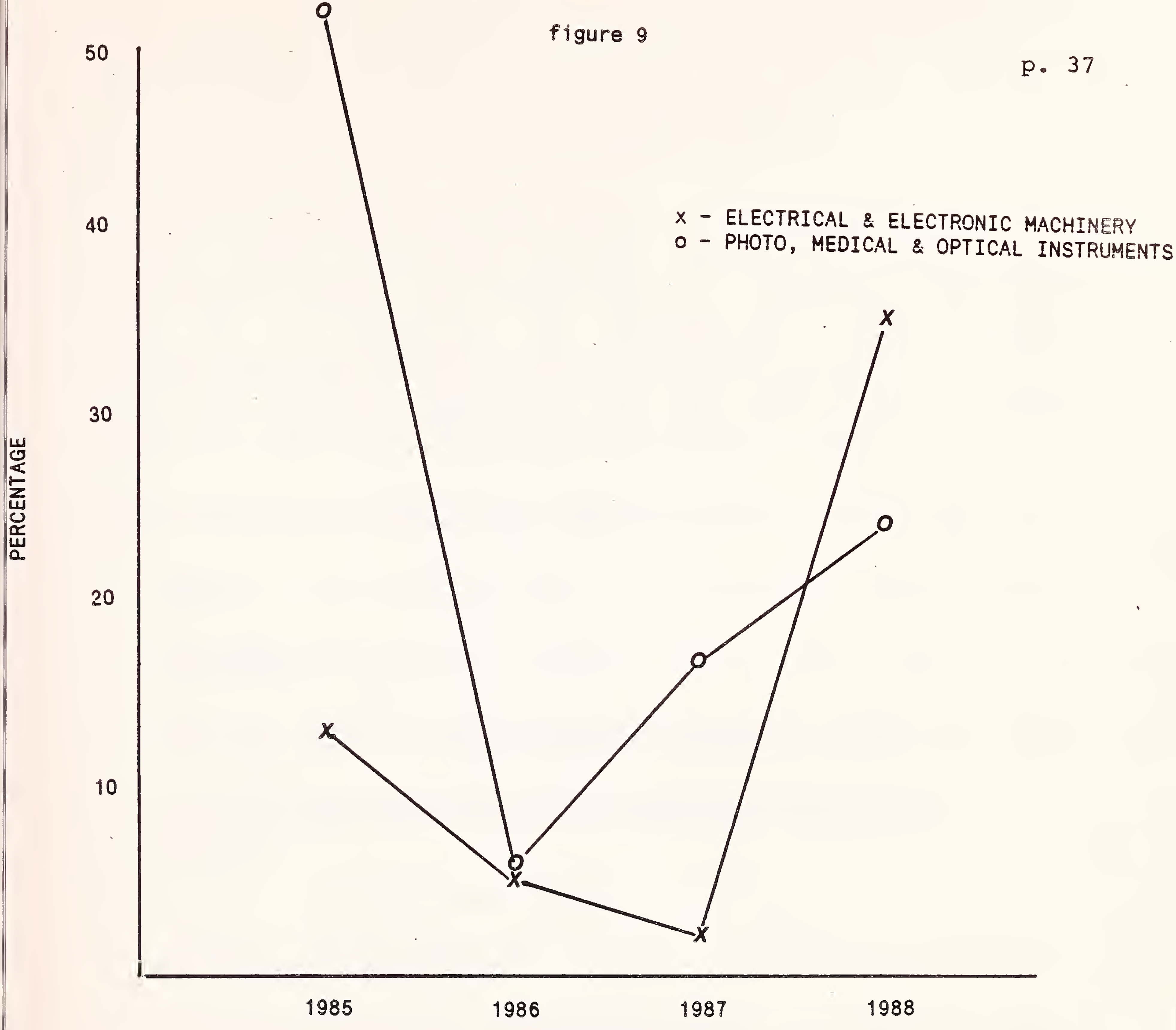
defined as events:
- control sought (110)
- employee stock ownership plan (60)
- hostile (26)
- merger agreement (12)
- tender offer (51)

Figure 9 examines the proportion of the National filings in these two SIC's which were made in Massachusetts. In SIC 36, the trend appears to have shifted toward a dramatic increase in the proportion of those filings occuring in Massachusetts during 1988. In SIC 38, a comparable shift appears to have occured in 1987.

5. General Observations

As previously stated, interpretation of these results must be guarded, at best. There appear to be significant trends, however, suggesting that merger and acquisition activity in Massachusetts is increasing at a faster rate than that of the Nation overall. This means that there may be a higher concentration of such activity in Massachusetts than there is on the average in other states. This activity appears to be concentrated in certain types of filings and in certain industries represented by a handful of SIC's. The industries in which there appear to be the highest concentration of filings are also those industries with a high degree of significance to the Massachusetts economy (in terms of their aggregate size as well as other factors).

figure 9



SIC 36, "ELECTRICAL & ELECTRONIC MACHINERY"

& SIC 38, "PHOTO, MEDICAL & OPTICAL INSTRUMENTS"

FOR COMBINED KEY FILINGS*

MASSACHUSETTS AS A PERCENTAGE OF NATIONAL

1985 - 1988e

<u>Events</u> (event code)

control sought (110)
employee stock ownership plan (60)
hostile (26)
merger agreement (12)
tender offer (51)

III. Research Recommendations

It must be stressed that the arena of corporate takeover is a highly dynamic one. The "picture" appears to change very rapidly. In order to be able to arrive at any strong conclusions about these changes, the trends they may represent, and their impact on the economy of the Commonwealth, a more rigorous scientifically based study must be undertaken. The Commission Database and the present research effort only provide a platform for a more rigorous study. They will have served their intended purpose if they have succeeded in surfacing some of the areas which may potentially be of interest in such a study.

There are certain steps which are likely to be elements of a more scientifically rigorous study. These include the following:

- collect a more <u>comprehensive body of merger and acquisition data</u>
- add <u>historical data</u> to database records if they are available
- perform a rigorous <u>quantitative analysis of variables</u> within the database and within merger & acquisition data
- collect <u>data samples on select variables from larger universe</u> (e.g. nationwide) to provide additional context
- perform a <u>correlational analysis</u> of variables
- perform a <u>trend analysis</u> (relative takeovers) on nationwide and Massachusetts data
- catalog and quantify <u>case histories of corporate takeovers</u> (including longer term economic impact)
- develop <u>models of the takeover process</u> based on nationwide trends, case histories, and analysis of database variables

The above steps are arranged such that each successive step taken results in the availability of more powerful and meaningful data. Each step is capable of standing alone in its function and utility. As a fully integrated set of tools, however, the final product would be a unique and powerful asset for the Commonwealth.

XIV. APPENDIX C: GLOSSARY OF TERMS

Acquiror:

The company, group or person acting as the buyer or surviving entity in an acquisition or merger.

Arbitrage:

A technique employed to take advantage of price differences in separate markets. This is accomplished by purchasing in one market for immediate sale in another at a better price. Such transactions may be executed in the same or similar types of securities. Arbitrage is also the matching of a lower rate liability against a higher rate asset.

Bear Hug:

An unsolicited, non-public offer by an acquiror to the management of a target company at a firm dollar amount. This type of offer is designed to put pressure on the board of directors and management to respond and negotiate rather than face a hostile tender offer.

Blue Sky Laws:

State laws regulating the distribution of securities within their respective territorial jurisdictions. If securities are offered in a particular state, the offering must be qualified under the laws of that state unless an exemption from qualification is available. In many states, exemptions exist for listed securities or securities senior to listed securities. Compliance with state blue sky laws is the responsibility of underwriters' counsel who will provide a "Blue Sky Memorandum" to the underwriters specifying the states in which the offering has been qualified or is exempt.

Consolidation:

Combination of two or more companies into a surviving corporation.

Corporate By-Laws:

Rules adopted for the government of a corporation. The by-laws may limit certain of the powers otherwise granted by the laws of the state in which the company is organized. Typical provisions of the by-laws relate to stockholders' meetings; terms of directors; directors and directors' meetings; officers of the corporation.

Debt Service:

Interest requirements plus the stipulated repayment of principal on outstanding debt, usually reported on an annual basis.

Divestiture:

The sale of a subsidiary, division or business line of a company.

Exchange Offer:

An offer to buy securities through an exchange for another class of securities. See Tender Offer.

Fairness Option.

A written opinion as to the financial fairness of a transaction. Such an opinion is typically given in acquisitions, purchases of blocks of stock, and in valuing securities for accounting or tax purposes. Sometimes the opinion is published in a proxy statement in connection with obtaining shareholder approval.

Friendly Offer:

Acquisition offer endorsed by the target company's board of directors and management.

Front End Loaded Offer:

Offer in which a tender or exchange is made for less than 100% of the shares of a company for a higher consideration than the acquiror intends to give the remaining acquiree shareholders in a second-step, "backend" merger.

Horizontal Integration:

The acquisition of a company in the same general business as the buyer but in perhaps a different location or on an expanded scale. An electric motor manufacturer in California who acquires a similar business in Ohio would be making a horizontally integrated acquisition.

Institutional Investor:

An organization whose primary purpose is to invest its own assets or those held in trust by it for others. Includes pension funds, insurance companies, investment companies, universities and banks.

Investment Grade:

A bond rated Baa3/BBB--or better. Colloquial term to describe bonds in which fiduciary institutions are permitted to invest.

Junk Bond:

A bond rated lower than Baa3/BBB--a credit below investment grade.

Leveraged Buyout:

The purchase of a controlling interest in a company primarily through the use of borrowed money. Often the lender, in addition to normal interest rates, acquires some portion of the equity securities in the acquired company. The key to a leveraged buyout is the ability of the cash flow of the acquired company to support the debt with which it has purchased.

Lock-Up:

In merger and acquisition terminology, an agreement between acquiror and acquiree whereby, during the period between announcement and closing of a transaction, the acquiror retains an option to purchase assets or stock of the acquiree, thus discouraging other potential bidders.

Merger:

A combination of two companies with one of the companies surviving or, more specifically, where one company acquires another. The acquired company is usually merged into the parent or one of its subsidiaries.

Premium:

In general, the percentage above the market value paid for a company in an acquisition or the amount, if any,an issuer pays in redeeming its debt prior to maturity.

Private Placement:

A means of financing in which a corporation, often with the aid of an investment banker acting as an agent, sells its securities directly to a small group of sophisticated investors. The securities are never offered to the public and thus are exempt from registration under the rules of the SEC. The corporation saves the time and expense of filing a registration statement with the SEC and obtaining a credit rating for its securities. Such securities cannot be resold unless registered pursuant to an exemption from registration.

Proxy Statement:

Disclosure statement soliciting shareholders to vote their shares in a particular manner. It is distributed annually by management in respect to the annual meeting of shareholders and at such other times as may be necessary; for instance, when necessary in connection with shareholder approval of a merger or other significant corporate transaction.

Raider:

An "unfriendly" or "hostile" bidder in a tender or exchange offer.

Schedule 13D Disclosure:

Disclosure document required to be filed with the SEC under the Williams Act upon acquisition of 5% of a company's stock. Disclosure of the holding and purpose of investment is made by the acquiror in the 13D filing.

Target:

The company that is sold or acquired in an acquisition or merger.

Tender Offer:

Cash offer made to stockholders of a company to sell their holdings directly to the acquiror. Tender offers may be "friendly" (where the board of the target approves transaction) or "unfriendly" or "hostile" (where the board of the target does not approve transaction).

To Go Private:

A transaction in which private investors gain control of a formerly public company by purchasing all or substantially all of the company's stock. The company's stock ceases to trade in the market and the company is no longer subject to SEC rules and regulations.

Two-Step Transaction:

Acquisition by tender or exchange offer for part of a company followed by a second step merger for the remaining interest in the acquired company.

Vertical Integration:

The acquisition of a company where the products or services of one corporation (buyer or seller) become part of the products or services of the other. A manufacturer of electric motors who acquires a foundry to produce castings for the motors would be making a vertically integrated acquisition.

White Knight:

A "friendly" bidder in a takeover battle who bids with the blessing of the target after an "unfriendly" bid has been made.

XV. APPENDIX D: BIBLIOGRAPHY OF COMMISSION BRIEFINGS

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March 9, 1988

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Robert LeMire, Legislative Coordinator, LL-1726, International Association of Machinists and Aerospace Workers

Joseph E. Mullaney, Senior Vice President, Legal, Gillette Corporation

Arthur R. Osborn, President, Massachusetts AFL/CIO

Bruce Scott, Professor, Harvard Business School

Paul E. Tierney, Esquire, Gollust, Tierney and Oliver (Coniston Group)

Paul D. Weaver, General Counsel, Houghton Mifflin

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